82-1303

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

(Case No. 1)
JOHN BUTTREY and JOHN BUTTREY DEVELOPMENTS, INC.
Petitioners

versus

UNITED STATES OF AMERICA, ET AL.,
Respondents

and

(Case No. 2)
JOHN BUTTREY and JOHN BUTTREY DEVELOPMENTS, INC.
Petitioners

versus

UNITED STATES OF AMERICA, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES K. REASONOVER
HOWARD J. ETTINGER
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, La. 70139
Telephone: 504/581-5141
Attorneys for Petitioners,
John Buttrey and John
Buttrey Developments, Inc.

QUESTIONS PRESENTED

CAN THE UNITED STATES ARMY CORPS OF ENGINEERS PROPERLY ASSERT JURISDICTION OVER CIVILIAN ACTIVITIES ON PRIVATE PROPERTY UNDER SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT?

1. Is Congress' delegation of permit powers to the Army Corps of Engineers under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. Section 1344, prohibited by Article I, Section 8, clauses 11 through 14 of the United States Constitution, to the extent that Section 404 vests civil law enforcement authority in the military?

IS THE UNITED STATES ARMY CORPS OF ENGINEERS REQUIRED TO PROVIDE AN ADVERSARY HEARING UNDER SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT?

2. Does Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. §1344, require the United States Army Corps of Engineers to conduct an adversary hearing with the opportunity to cross-examine witnesses in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §551 *et seq*, when the Army Corps asserts jurisdiction under the Act and prohibits projects on privately owned property? Three other Circuits have held that identical language in another section of the same Act (Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. §1342) requires such a hearing.

3. Does the Due Process Clause of the United States Constitution mandate that an adversary hearing be granted to an applicant when the United States Army Corps of

Engineers asserts jurisdiction under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. §1344, and refuses to issue a permit authorizing private work on privately owned property?

PARTIES TO THE PROCEEDINGS

The two petitioners in this writ application were the only appellants in the Circuit Court and the only plaintiffs in the District Court. In addition to the United States of America, the appellees and original defendants below consisted of Clifford L. Alexander, Jr., Secretary of the Army, Major General Joseph K. Bratton, Chief of Engineers, and Colonel Robert H. Ryan, District Engineer, U. S. Army Corps of Engineers, Mobile District. There were no other parties to this litigation.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN BUTTREY and JOHN BUTTREY DEVELOPMENTS, INC.,

Petitioners

versus

UNITED STATES OF AMERICA, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, John Buttrey and John Buttrey Developments, Inc., respectfully pray that writs of certiorari issue to review the two judgments of the Court of Appeals for the Fifth Circuit entered on November 8, 1982.

OPINIONS BELOW

The two opinions of the Court of Appeals for the Fifth Circuit, *John Buttrey and John Buttrey Developments, Inc. versus United States of America, et al.*, C.A. 81-3234, slip opinion p. 534, (5th Cir. 11/8/82), and *John Buttrey and John Buttrey Developments, Inc. versus United States*

of America, et al., C.A. 81-3649, slip opinion, p. 552 (5th Cir. 11/8/82), appear as appendices A and B, respectively, in the attached appendix. A copy of the district court's opinion in the first case appears as appendice C. No written opinion was filed in the second case by the district court but judgment was rendered orally from the bench. A transcript of this ruling appears as appendice D. The district court's rulings are unreported. These two cases were consolidated for oral argument by the Fifth Circuit and the opinions, although separate, were rendered on the same day. Both opinions involve the same parties and relate to the Corps of Engineers' exercise of permitting power under the same statute.

JURISDICTION

The Court of Appeals entered judgment in these matters on November 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) Article I, Section 8, clauses 11 through 14 of the United States Constitution provide:

"The Congress shall have Power . . .

To Declare War, Grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To Raise and Support Armies, but no Appropriation of Money to that Use shall be for longer Term than Two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the Land and Naval Forces".

2) Section 404(a) of the Federal Water Pollution Control Act, 33 U.S.C. Section 1344(a):

> The Secretary may issue permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection."

The full text of this statute is set forth in the attached appendix as appendice E.

STATEMENT OF THE CASE

This Petition for Certiorari applies to two separate suits, involving two distinct issues; but both of the suits concern the same parties and statute and relate to Petitioners' attempt to improve an already-existing residential subdivision in south Louisiana. Certain portions of the subdivision were found to be "wetlands" by the United States Army Corps of Engineer ("Corps"), and it is the Corps' refusal to allow further development which led to this litigation.

In an effort to alleviate the threat of flooding to the

subdivision (a problem which effects almost all of south Louisiana), to enhance the attractiveness of the area, and to provide additional facilities to the subdivision, Petitioners sought to undertake three separate projects on their private property. In all three instances, the Corps either denied permits or sought to enjoin these projects.

The project involved in the first suit (hereinafter "Buttrey I") involved the excavation of a small lake, with the fill to be used for construction of a levee for flood protection. The second suit ("ButtreyII") arose after the Corps issued two cease and desist orders in 1980; one relating to a sewage treatment plant which was built in 1976 and had been in operation since that time, and another enjoining excavation of a small pond.

In Buttrey I, Petitioners filed an application with the Corps for a permit to undertake the contemplated dredge work described above. In response thereto, the Corps issued a public notice of the permit application. After the comment period had been concluded, Petitioners were mailed copies of the comments. Petitioners responded to these public comments with data it had compiled and arguments in support of the issuance of the permit and objected to the Corps' assertion of jurisdiction over this project.

Petitioners further requested that the Corps notify them of any specific objections involved, an opportunity to file responses to these objections, an opportunity to meet with the Corps to discuss any of these objections, and, if any of the objections were sufficient to preclude the issuance of the permit, an adversary hearing with the right to cross-examine witnesses. The Corps refused to grant the adversary hearing as requested, stating that such a hearing was not

required. 1/

Shortly thereafter, the Corps denied Petitioners' application for a permit on the alleged grounds that there would be a significant impact on the environment and that the project would not be "in the public interest." Petitioners then filed Buttrey I seeking judicial review of the Corps' finding of jurisdiction and of the denial of the permit. Buttrey I specifically challenged the Corps' refusal to grant any hearing whatsoever with respect to both its jurisdictional findings and its factual finding relating to the denial of the permit.

Petitioners were allowed to take only two depositions, both of which the district court limited to jurisdictional questions only, in opposition to the Corps' motion for summary judgment. The district court subsequently concluded that a hearing before either the Corps or the Court was unnecessary and granted the Corps' motion for summary judgment, upholding the Corps' actions in all respects. The Court of Appeals affirmed the district court's decision. The Fifth Circuit found that Petitioners had been afforded a "paper hearing", p. 544, and that an adversary hearing was not required. This conclusion was reached, even after the Court noted that "[t]hree other circuits have construed virtually identical language in section 402 [of the same Act] to require a trial-type hearing". p. 538.

1/ The Corps met informally with Petitioners on one occasion. However, nothing was accomplished at this meeting, since the Corps was unable to identify any objections to the project. There is no record of what transpired at this meeting and there is no discussion of the substance of this meeting anywhere in the administrative record.

Buttrey II, which arose shortly after Buttrey I was filed in the District Court, challenges the Corps' jurisdiction, as a branch of the military, to enforce civil laws against civilians with respect to private activities on private property. This challenge to the Corps' jurisdiction arose as a result of the Corps' issuance of two cease and desist orders. 2/

After the Corps issued these two cease and desist orders, Petitioners filed Buttrey II, a multi-count complaint, wherein Petitioners contested the Corps' jurisdiction over these two projects and, in a more basic argument, contested the Corps' civil law enforcement jurisdiction over United States citizens on private property. Only this last argument is presently before this Court.

2/ The first cease and desist order concerned a sewerage treatment plant which was constructed in 1976. This order was issued only three days after Buttrey I had been filed. No discussions had taken place between the Corps and Petitioners concerning this treatment plant, and the Corps had not previously indicated that it had any problems with this plant prior to the filing of Buttrey I and the Corps' subsequent issuance of the cease and desist order.

The second cease and desist order was aimed at a small pond which Petitioners advised the Corps they were going to dig. After giving the Corps all of the details concerning this project, and discussing this project with the Corps, Petitioners wrote the Corps on October 1, 1980, advising that they would begin work on the pond on October 15, 1980, and stating that it was their understanding that no permits would be required. Colonel Ryan, the Corps' Mobile District Engineer, replied by letter dated October 22, 1980, that Section 404 of the Federal Water Pollution Control Act (FWPCA) did not apply to excavations, and that a "Department of Army permit would not be required" if all the excavated materials were removed from the site. Petitioners then began digging the pond in accordance with the Corps' letter. Nonetheless, on November 21, 1980, the Corps issued a cease and desist order enjoining all work at the pond.

The district court again granted the Corps' motion for summary judgment, and the decision was affirmed on appeal. The Fifth Circuit held that Congress could vest the United States Army Corps of Engineers with permitting powers under the FWPCA pursuant to the Commerce Clause, p. 555, and noted that the Corps is a "civil arm of a military agency." p. 557. (Two other counts of the Complaint in Buttrey II, relating to the propriety of issuing the cease and desist orders, are still before the district court.)

REASONS FOR GRANTING THE WRIT

There are three basic issues raised in these two cases which were consolidated for argument in the Court of Appeals. Buttrey II presents a fundamental challenge to the Army Corps of Engineers' jurisdiction under the FWPCA. This argument is based on the premise that Congress' delegation of permitting powers to the Army Corps of Engineers under FWPCA is violative of Article I, Section 8, clauses 11 through 14 of the United States Constitution, which embody our Founding Fathers' fear of military control over civilians. These provisions prohibit Congress from passing any legislation which provides for military civil law enforcement. The Fifth Circuit erred in upholding the Corps' civil law enforcement jurisdiction on the basis of the Commerce Clause. The "war power" provisions bar Congress from passing any legislation which places authority over civilians in the hands of the military, regardless of the underlying authority of the law. The power of the military to enforce civil laws with respect to the private activities of American citizens in their own back yards is repugnant to the most fundamental concepts on which our Constitution is based.

If it is found that the Army can properly assert civil law enforcement jurisdiction over civilian activities on

private property, Buttrey I then challenges the procedures and safeguards used by the Corps in determining its own jurisdiction and denying permits for private projects on privately owned property. Under current procedures, a permit applicant is entitled to a "paper hearing" in which the applicant is permitted only to reply to public comments received in response to a public notice. There is no requirement that an adversary hearing be held before the Corps asserts its jurisdiction under the FWPCA and denies permits. An applicant is not given a meaningful opportunity to participate in the Corps' decision-making process, and is not entitled to confront or cross-examine witnesses, all of which result in an abdication of meaningful judicial review, in violation of the Administrative Procedure Act and the Due Process Clause of the United States Constitution.

I. *CAN THE UNITED STATES ARMY CORPS OF ENGINEERS PROPERLY ASSERT JURISDICTION OVER CIVILIAN ACTIVITIES ON PRIVATE PROP*ERTY UNDER SECTION 404 OF THE FWPCA?

> **Is Congress' delegation of permit powers to the Army Corps of Engineers under Section 404 of the Federal Water Pollution Control Act prohibited by the United States Constitution, to the extent that Section 404 vests civil law enforcement authority in the military?**

There are four very basic, uncontested facts which underlie this argument: 1 - the Corps is a division of the

United States Army; 3/ 2 - under the FWPCA, the Corps has authority to regulate all forms of activities in what it deems to be "wetlands", both public and private property, in areas far removed from any seacoast or navigable river; 3 - this authority entitles the Corps to regulate and assert control over United States citizens and to seek civil and criminal penalties for violations of the Act; and 4 - the FWPCA is purely an environmental statute which has no military or defense purposes.

The history surrounding the formation of the Constitution is replete with the efforts of our Founding Fathers to limit the control and sphere of the military and to subordinate it to civilian authority. They were determined to put checks on the power of the military and to prevent the military from asserting law enforcement powers over civilians. As stated by Representative Kimmel of Maryland during the debates which proceeded the enactment of the Possee Comitatus Act:

> "Throughout the entire discussion of the standing army, it is clear that the American spirit would not tolerate the possibility of employing that army for the execution of the laws. The opinion of the times was distinctly and unanimously against it. This opinion is embodied in the Constitution. It is evident in the groupings of the powers conferred on Congress. The war power is given in Article 1, section 8, in clauses numbered 11, 12, 13 and 14.
>
> * * * *

3/ In fact, the authority to issue permits under the FWPCA is given to the Secretary of the Army, who acts through the Corps. 13 U.S.C. §1344(d).

> This is too plain for argument. In these four clauses is conferred the power to declare war and the power to obtain the means for carrying on the war. And then another power is given, separate and distinct from the war power. The power to execute the laws, suppress insurrections, and repel invasions is given in clauses 15 and 16.
>
> * * * *
>
> In these two clauses is conferred the power to execute the laws of the Union, suppress insurrections, and repel invasions, and the means for exercising this power. These two powers are as distinct as are the means to be employed for the exercise of them, the Army for defense against external foes, the militia for the suppression of internal resistance, the Army to be created by Congress, because war is a subject of national jurisdiction only; the militia to be created jointly by Congress and the States, because the execution of the laws of the Union and the suppression of insurrections may involve question of disputed jurisdiction. By these provisions the people were to be protected by interference by such army as Congress might maintain." 7 Cong. Rec. 3581 (1878).

The opinions which have interpreted Article I, Section 8, clauses 11-14 have clearly held that the military is not to have any law enforcement authority over American citizens. For example, in *Laird vs Tatum*, 408 U.S. 1, 92

S.Ct. 2318 (1972), this Court was faced with a complaint against army surveillance of civilians during the late 1960's. The army was keeping informational files on people observed at "protest rallies". This suit was dismissed for lack of standing, but language from Chief Justice Burger's majority opinion and Justice Douglas' dissent are particularly on point. At the end of the majority opinion, this Court stated:

> "The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities - and indeed the claims alleged in the complaint - reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially recognizable injuries resulting from military intrusion into the civilian sector, the federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."

408 U.S. at 15-16.

Justice Douglas was appalled at the idea that the military had become active in matters involving American citizens:

> "The upshot is that the Armed Services - as distinguished from the 'militia' - are not regulatory agencies or bureaus that may be created as Congress desires and granted such powers as are seen necessary and proper. The authority to provide rules 'governing' the Armed Services means the grant of authority to the Armed Services to govern themselves, not the authority to govern civilians". 408 U.S. at 18-19

and

> "The action in turning the 'armies' loose on surveillance of civilians was a gross repudiation of our traditions. The military, though important to us, is subservient and restricted purely to military missions. It even took an Act of Congress to allow a member of the Joint Chiefs of Staff to address the Congress; and that small step did not go unnoticed, but was in fact viewed with alarm by those respectful of the civilian tradition". 408 U.S. at 23

This Court has had an opportunity to deal with Article I, Section 8, clauses 11 through 14 on several occasions. In most of these cases, the issues dealt with the military's right to court-martial non-military personnel. In all of these cases, it was specifically held that the military has no jurisdiction over civilians. Such cases include *Reid vs Covert,*

354 U.S. 1, 77 S.Ct. 1222 (1957), *O'Callahan vs Parker*, 395 U.S. 258, 89 S.Ct. 1683 (1969), *McElroy vs United States ex rel. Guagliardo*, 361 U.S. 281, 80 S.Ct. 305 (1960), *Kinsella vs United States ex rel. Singleton*, 361 U.S. 234, 80 S.Ct. 297 (1960), *United States ex rel. Toth vs Quarles*, 350 U.S. 11, 76 S.Ct. 1 (1955), and *Ex Parte Milligan*, 71 U.S. 2 (1866).

In *United States vs Walden*, 490 F.2d 372 (4th Cir. 1974), the court had before it a motion to suppress evidence obtained by marines in an undercover capacity. In granting this motion, the court relied on Navy Instruction 5400.12 which barred the use of naval personnel for the enforcement of criminal or civil statutes. Although it was not necessary for the court to pass on the constitutional question, the court noted the long standing antipathy of Americans to the involvement of the military in civil law enforcement and their fear of a standing army.

In Buttrey II, the Court of Appeals ignored the absolute constitutional prohibition against military law enforcement jurisdiction over civilians, and erred in allowing this to occur under the FWPCA on the basis that this statute has its origin in the Commerce Clause. In upholding the Corps' right to assert authority over civilians under the FWPCA, the Fifth Circuit found that the Corps' powers under the FWPCA derive from the Commerce Clause, and not the "war power" provisions of the Constitution. For this reason, the lower court felt that delegation of powers to the Corps was proper despite the clear prohibitions in Article I, Section 8, clauses 11-14.

The Fifth Circuit's decision in Buttrey II would, if upheld, totally emasculate the Constitution's restrictions on congressional power to enact legislation which provides for mil-

itary authority over civilians. If Congress can legislate with regard to the military to the full extent of its powers under the Commerce Clause, the "war power" provisions of the Constitution would have no application nor meaning. The military would be able to assert authority over citizens to the full extent that Congress itself can assert such authority. If the decision is upheld, military jurisdiction could be asserted in such areas as social security, labor-managment relationships, banking, transportation, etc., as well as all other phases of environmental regulation, all under the authority of the Commerce Clause.

The Court of Appeals could not cite a single case in support of its decision in Buttrey II. Without any law to support its decision, the Court then erred in attempting to distinguish the cases cited by Petitioners. The Court noted that in the military court-martial cases cited above, the imposition of court-martial jurisdiction over civilians invaded the jurisdiction of the civil courts and deprived these persons of their right to a trial by jury. While that may be true, it was not the basis for this Court's holdings in those cases. Article I, Section 8, clauses 11 through 14 do not limit the use of the military in civilian affairs only when other provisions of the Constitution are at issue; this is a blanket prohibition without limitation.

The Court of Appeals also noted the "unique nature of the Corps" and its performance of civil functions over the past 150 years. However, Petitioners submit that there is no such thing as a "civil arm of a military agency", p. 557, and point out that the Corps' assumption of powers under the FWPCA is of recent origin. 4/ Prior to 1972, Corps

4/ The Fifth Circuit's reliance on the existence of a civilian official within the Army Corps of Engineers is the only basis for the court's finding that this particular branch of the Army has a "civil arm".

authority was generally limited to navigable bodies of water as traditionally defined under Section 10 of the Rivers and Harbors Act, 33 U.S.C. §403, over which the federal government has always had a legitimate military interest, but which does not entitle the Corps to assert authority over the private activities in back yards of private citizens.

Although Congress clearly has authority to vest any non-military agency with jurisdiction under Section 404 of the FWPCA, Article I, Section 8, clauses 11 through 14 prohibit the Armed Forces from enforcing Section 404 with respect to civilian activities on private property. The extent of Congress' powers to legislate under the Commerce Clause in no way effects or alters this clear prohibition on the use of military power over civilians. The Court of Appeals' holding effectively writes these prohibitions out of the Constitution.

II. *IS THE UNITED STATES ARMY CORPS OF ENGINEERS REQUIRED TO PROVIDE AN ADVERSARY HEARING UNDER SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT*

In deciding that jurisdiction under the FWPCA existed and that Petitioners' project in Buttrey I was not in the public interest, the Corps only allowed Petitioners to respond to comments gathered in response to a public notice.

Considering the substantial adverse impact that denial

4/ Continued
This is tantamount to concluding that all of the military is really civil in nature because of the presence of a civilian as Secretary of Defense, or the President as Commander-in-Chief. Such a conclusion also ignores the fact that the delegation of authority actually involved is to the District Engineer, an Army Colonel, who makes and signs all decisions.

of this permit will have on Petitioners, and considering the effect the granting or denial of Corps permits under the FWPCA can have on other applicants, Petitioners submit that the Corps' "paper hearing" procedures are wholly inadequate to protect Petitioners and other applicants from erroneous and arbitrary decisions, in violation of the Due Process Clause of the United States Constitution and, furthermore, fail to comply with the statutory scheme envisioned by the Act.

A. *Application of the Administrative Procedure Act*

> **Does Section 404 of the Federal Water Pollution Control Act require that the United States Army Corps of Engineers conduct an adversary hearing with the opportunity to cross-examine witnesses in accordance with the provisions of the Administrative Procedure Act, when the U. S. Army Corps of Engineers asserts jurisdiction under the Act and prohibits projects on privately owned property? Three other Circuits have held that similar language in Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. §1342, requires such a hearing.**

Section 404, 33 USC §1344, which gives the Secretary of the Army permit powers over "wetlands" under the FWPCA, reads, in part:

> "The Secretary may issue permits, *after notice and opportunity for public hearing* for the discharge of dredged or fill material into the navigable waters at specified disposal sites." (Emphasis added.)

Section 402 of the FWPCA, 33 §1342, which gives the Administrator of the Environmental Protection Agency permit powers over the discharge of pollutants into navigable waters, reads, in part:

> "Except as provided in Sections 1328 and 1344 of this title, the Administrator may, *after opportunity for public hearing*, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding Section 1311(a) of this title . . ."
> (Emphasis added.)

In three prior cases, three different Circuit Courts have interpreted the "after opportunity for public hearing" language in Section 402 as requiring an adversary hearing with the right of cross-examination. *Seacoast Anti-Pollution League vs Costle*, 572 F.2d 872 (1st Cir. 1978), *Marathon Oil Company vs Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977), *United States Steel Corporation vs. Train*, 556 F.2d 822 (7th Cir. 1977). In these opinions, the courts ruled that the Administrative Procedure Act, 5 U.S.C. §551, *et seq*, was applicable. Nonetheless, the Fifth Circuit herein held that the identical language in Section 404 does not require an adversary hearing.

After determining that the granting or denial of a permit under Section 402 was an adjudication, the court in *Seacoast Anti-Pollution League vs Costle*, quoting in part from *Marathon Oil, Co.*, stated:

> " 'As the instant proceeding well demonstrates, the factual questions involved in the issuance of Section 402 permits will frequently be sharply disputed. Adversarial

> hearings will be helpful, therefore, in guaranteeing both reasoned decisionmaking and meaningful judicial review.' " p. 876.

and

> "This is exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended." p. 876.

The Fifth Circuit in Buttrey I conceded that the language in Section 402 and Section 404 is very similar and that both sections are part of the same scheme, but found that the three above-cited decisions are inapposite, simply on the basis that the Corps regulates permits under Section 404 while the EPA administers Section 402 permits. This decision was reached upon a purported finding of congressional approval of the Corps' paper hearing procedures under the Rivers and Harbors Act, 33 USC §403.

Other than the agencies which are authorized to issue these permits, and the difference between the types of discharges involved, there is nothing to distinguish Section 402 and 404. The same individualized factual determinations must be made in deciding whether or not to issue a permit under either one of these sections. An adjudicatory hearing under Section 404 is just as necessary as one under 402, as the decision whether or not to issue a permit is heavily fact oriented and dependent of the particular situation in each case. This was patently recognized in the Section 402 cases where the courts found the processing of permits to be an adjudication under the Administrative Procedure Act. A permit application under Section 404 is likewise an adjudication, as readily conceded by the Corps.

In view of the substantial nature of the constitutional rights involved, reference to the Corps' permit procedures under a wholly different statute is insufficient evidence of congressional intent to establish such greatly varying permit procedures under these two interrelated environmental statutes. The holdings of the courts in *Seacoast Anti-Pollution League, Marathon Oil Company* and *United States Steel Corporation*, interpreting the language "after opportunity for public hearing" in Section 402 of the same Act as requiring the EPA to hold an adjudicatory hearing, are applicable to Section 404.

B. ***Adversary Hearing Required Under the Due Process Clause.***

Does the Due Process Clause of the United States Constitution mandate that an adversary hearing be granted to an applicant when the United States Army Corps of Engineers asserts jurisdiction under Section 404 of the Federal Water Pollution Control Act, and refuses to issue a permit authorizing private work on privately owned property?

In addition to the statutory requirement of a hearing under the Administrative Procedures Act, there is also a constitutional due process ground for requiring that an adversary hearing be held.

It is a basic principle of constitutional law that a party to an administrative proceeding have an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). In *Greene v McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959), this Court

elaborated on the manner in which the administrative proceeding must be conducted:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . We have formalized these protections in the requirements of confrontation and cross-examination." 360 U.S. at 496.

In *Mathews vs Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), this Court set out three factors which must be considered in determining what "due process" is required when governmental action is taken against private interests:

> "First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 424 U.S. at 335.

The first factor in *Mathews* is the nature of the private interests effected. Although the Fifth Circuit found that "Buttrey clearly has a strong 'private interest' ", p. 542,

the court makes light of this interest by characterizing Buttrey's property as "worthless swampland", p. 542. The court ignored the fact that most of south Louisiana (as well as large portions of other states) is worthless swampland, that Buttrey makes his living as a residential developer, and that this denial of a permit will adversely effect "the very means by which [he lives]", p. 542. By finding that Buttrey is not "on the very margin of subsistence", p. 542, the Court holds that Buttrey has lost the right to contest arbitrary governmental action and to be protected from governmental errors.

The Fifth Circuit holds that Buttrey is not entitled to a hearing because he is merely "applying" for a permit, finding a distinction between revocation of a license and the initial denial of an application. The court finds that this is merely a question of government action which simply maintains the status quo. It is impossible, however, to understand the court's distinction between the initial right to use property and the right to continue in the use of property. Moreover the Court of Appeals' approach is contrary to the Administrative Procedure Act which requires a hearing for permit procedures, regardless of whether it is an initial application or revocation. 5 U.S.C. §551(9).

The Corps determined that Buttrey's property constituted "wetlands", with the result that even innocuous and everyday activities on private property are forbidden without the Army's permission. Buttrey has a strong private interest in the right to improve his land, and to protect it from flooding, 5/ which should entitle him to an adjudicatory

5/ After the Fifth Circuit conceded that Buttrey's facutal contention regarding flooding "poses a difficult problem" (at p. 546), the court then out-of-hand rejected the report of Buttrey's consulting

hearing whenever a permit application is denied. *Mathews'* first factor, consideration of the private interest at stake, must be weighed heavily in favor of holding a full hearing.

The Fifth Circuit weighs the second factor set out in *Mathews* in favor of the Government by finding that the Corps gave Buttrey a "paper hearing" which adequately protected him against the risk of an erroneous decision. This "paper hearing" consisted of Buttrey's right to review the comments received in response to publication of Buttrey's permit application and Buttrey's response to those comments.

It is apparent, however, that this so-called "paper hearing" was constitutionally inadequate. At no time prior to the denial of the permit were Petitioners advised of the Corps' tentative position with regard to the application, of any objections the Corps, itself, had with respect to issuing the permit or of any independent research or fact-finding undertaken by the Corps. Petitioners were also never afforded the opportunity to refute or respond to specific findings or objections of the Corps. Petitioners were able merely to respond to public comments received by the Corps, although,

---

5/ Continued
engineer that the project would "minimize flooding" on the ground that the report is unsupported by the evidence. The Court, on appeal, rejected the expert's findings, even though no one had even challenged it in the district court. The court's reference to facts concerning past flooding, the extent of damage and the potential of the project to prevent flooding should be exactly the types of issues which can only be determined at a hearing. The Fifth Circuit concluded that the "difficult problem" relating to flooding was not an issue, even though there is no evidence contradicting the consulting engineer's finding that the project would "minimize flooding".

obviously, Petitioners never had the chance to confront the persons making these comments.

This is contrary to the hearing which this Court upheld in *Mathews*. In that case, this Court noted:

> "A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits, the agency informs the recipient of its tentative assessment, the reasons therefore, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to 'mold' his argument to respond to the precise issues which the decisionmaker regards as crucial." 424 U.S. at 345-346.

In *Morgan v United States*, 304 U.S. 1, 58 S.Ct. 773 (1938), this Court stated:

> "[A] 'full hearing' - a fair and open hearing - requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument

> implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." 304 U. S. at 18-19.

As with all Corps permit applications, Petitioners had to blindly submit arguments in support of issuance of a permit, never knowing the Corps' position. For all practical purposes, the "paper hearing" which the Court held to be constitutional, consisted solely of the right to respond to unsupported comments from faceless opponents.

With regard to *Mathews'* third factor, concerning fiscal and administrative considerations, the lower court noted that the Corps has no administrative law judges assigned to it and that the burden of adjudicatory hearings would make the Corps' responsibilities under Section 404 impossible to carry out. However, there is absolutely nothing in the record to support this finding. Except for the number of applications received each year by the Mobile District, there is no evidence that a permit process which includes a meaningful hearing would, in those cases when substantial substantive rights are involved, render Section 404 impossible to police. It is unknown how many applications involve substantial substantive rights and how many applicants will request a hearing. This statement by the Court of Appeals is mere conjecture. 6/

6/ The EPA regularly grants adjudicatory hearings whenever substantive, substantial rights are at issue. See *Costle v Pacific Legal Foundation*, 445 U.S. 198, 215, 100 S.Ct. 1095 (1980). However, no appli-

More importantly, it is obvious from *Mathews* that the added impact of full administrative proceedings on the government is simply to be considered, but will never suffice to overcome a legitimate need for a due process hearing. In *Mathews*, this Court stated that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision" but that "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative actions and to society in terms of increased assurance that the action is just, may be outweighed by the cost". 424 U.S. at 348.

It is overwhelmingly obvious from the record in this case that substantial substantive rights are involved with respect to Buttrey's permit request and that the "due process" afforded Petitioners was superficial. An adjudicatory hearing will add to the Corps' responsibilities under Section 404, but such hearings are needed to protect citizens against arbitrary decisions and bolster the anemic "paper hearing" system which now exists. With the very important private interest involved here, the very minimal "due process" afforded Petitioners and the lack of any evidence as to added costs and administrative burdens, the third test of *Mathews* does not support the Court of Appeals' decision that an adjudicatory hearing is not required.

Finally, the Court of Appeals misconstrued the circumstances surrounding permit applications under Section 404 when it held that only so-called "legislative facts" are in-

---

6/ Continued
cant is ever given an adjudicatory hearing under Section 404, regardless of the magnitude or importance of the proposed project and the complexity of the issues involved.

volved. Although the Corps must determine the propriety of issuing a permit in light of the purpose and intent of the statute, each permit application arises in an unique situation and the Corps must investigate, accumulate and weigh facts to determine if a permit should be issued. The Corps does not formulate policies or rules of general application when it is faced with an application for a permit. As pointed by the courts interpreting Section 402, this is the precise type of situation which demands that an adjudicatory hearing be held.

A determination on the Buttrey permit application does not require the resolution of broad policy questions affecting many parties. Rather, it involves the resolution of "[f]acts pertaining to the parties and their businesses and activities, that is, adjudicative facts . . . intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial." 2 K. C. Davis, *Administrative Law Treatise*, Section 12:3 at 413. Petitioners' application involves only those facts applicable to their property: are wetlands involved; if so, to what extent; will water quality or the environment be adversely affected; if so, in what ways and to what extent; does the proposed project provide any public benefits; if so, will the public interest be best served by authorizing the project.

Neither the Government nor the appellate court identified the legislative facts which were supposedly involved. To the contrary, in delving into the merits of the denial of the permit, the court noted: "[t]he particular facts of this wetlands controversy now become critically important", p. 544. Moreover, the court's attempt to underplay the

usefulness of cross-examining scientific witnesses as "an exercise in futility", p. 547, is meritless on its face. This is not a case of negating the influence of an expert witness whom the trier of fact has had an opportunity to meet and evaluate.

In denying permits, the Corps now relies almost exclusively on comments by persons whom it has never seen, and the comments themselves are often the standard objections produced from a plastic tape and an automatic typewriter. Cross-examination would help identify those objections which really apply and truly have merit. Additionally, a full trial with cross-examination would ease a reviewing court's task in determining whether the Corps fully considered and understood the facts before it.

> As previously stated by this Court, again in *Mathews:*
>
> "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'. All that is necessary is that the procedure be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." 424 U.S. at 348-349, citations omitted.

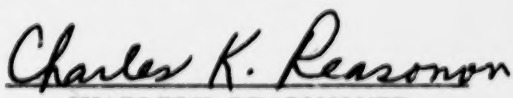
Such is not the case under Section 404. The chance to respond to outside comments, which is the only input permitted an applicant, does not provide the applicant with a "meaningful opportunity" to be heard.

With the severe impact the denial of a permit can have on private landowners, the great likelihood that additional safeguards will lessen the chance of arbitrary and erroneous decisionmaking, Petitioners submit that more than the Army's "paper hearing" is mandated by the Due Process Clause of the Constitution before a citizen is deprived of his livelihood and the use of his land.

CONCLUSION

The Court of Appeals erred in upholding Congress' grant of permitting powers to the Corps, a branch of the Army, under the FWPCA and in upholding the Corps' present procedure for determining its jurisdiction under FWPCA and for denying Section 404 permits. The United States Constitution clearly prohibits the military from assuming civil law enforcement powers. The existence of military jurisdiction over civilians is of even greater concern where the Corps' permitting procedures absolutely forbid adversary hearings, in violation of the Due Process Clause of the United States Constitution and the Administrative Procedure Act.

Respectfully submitted,



CHARLES K. REASONOVER
and
HOWARD J. ETTINGER
of
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-5141
Attorneys for Petitioners,
John Buttrey and John Buttrey
Developments, Inc.

APPENDICE A

John BUTTREY and John Buttrey Developments, Inc.,
Plaintiffs-Appellants,

v.

UNITED STATES of America, et al.,
Defendants-Appellees.

No. 81-3234

United States Court of Appeals, Fifth Circuit.

Nov. 8, 1982.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This is an appeal from a district court judgment rejecting the claim of plaintiffs-appellants John Buttrey and John Buttrey Developments, Inc. that the United States Army Corps of Engineers had improperly denied Buttrey's application for a dredge and fill permit under section 404 of the Clean Water Act. 33 U.S.C. §1344 (Supp. IV 1980). We conclude that the procedures afforded Buttrey in the determination of his permit application violated neither his statutory nor his constitutional rights and that the determination itself was neither arbitrary nor capricious. We therefore affirm the decision of the district court.

I. THE FACTS AND PROCEEDINGS BELOW.

John Buttrey is a land developer who builds residential homes. In November, 1978, he applied to the Mobile, Alabama, district office of the Corps of Engineers for a permit to channelize a half-mile long portion of a small, slow running stream known as Gum Bayou. The bayou passes near Slidell, Louisiana, before flowing into the West Pearl River. Buttrey accompanied his application with a letter from the Louisiana Stream Control Commission, stating that, having examined a drawing submitted by Buttrey, it was "of the opinion that water quality standards of the State of Louisiana will not be violated provided turbidity during dredging in public waters is kept to a practicable minimum." He also included comments from the St. Tammany Parish Mosquito Abatement District No. 2. The District stated that Buttrey's project would help eliminate potential mosquito breeding areas, provided only that adequate drainage was achieved as per the proposal to avoid the possibility of creating any new breeding sites.

The Corps of Engineers issued a formal public notice of the proposed dredge and fill operation on February 2, 1979. This notice was distributed to all known interested persons to assist in developing facts on which a decision could be based. In the ensuing months, the Corps received numerous comments opposing the issuance of the permit: letters came from the Fish and Wildlife Service of the United States Department of the Interior, the United States Environmental Protection Agency and the National Marine Fisheries Service of the United States Department of Commerce, and from numerous private organizations and individuals. The comments all tended to raise the same objections. The proposed project, they claimed, would destroy natural drainage and sewage treatment capacity, replace a habitat

and nursery ground for wildlife with residential homes, perhaps irrevocably damage an aesthetically pleasing wetland area, and, finally, increase the risk of flooding, both downstream and in Buttrey's neighboring Magnolia Forest housing development.

The Corps forwarded copies of all of the comments to Buttrey for review and response. Buttrey requested and received a six-month extension of time for filing his answer. On September 28, 1979, he submitted: (1) a memorandum of law supporting the permit request; (2) an environmental analysis with comments prepared by Dr. Alfred Smalley, Professor of Biology at Tulane University; (3) an engineering discussion with comments prepared by Ivan Borgen, a consulting engineer; (4) a letter supporting the application submitted by the Magnolia Forest Homeowners Association; (5) three other letters, also supporting the application, from downstream property owners; and (6) an aerial photograph of the area. With respect to "any objection which the Corps may feel to be of such a nature as to warrant denial of the permit," Buttrey requested: (1) that he be notified of the specific objection involved, and that he be permitted to provide the Corps a full and detailed response; (2) that he be granted a conference with the Corps in order to resolve any outstanding objections that could not be resolved on the basis of the material furnished; and (3) that, should there exist any objection that might preclude issuance of the permit, he be granted an adversary hearing, and an opportunity to cross-examine witnesses. The responsible official, District Engineer Col. Ryan, responded that Corps regulations preclude the possibility of a full adversary hearing, but that he would be happy to meet with Buttrey informally. Reserving his right to demand a full hearing, Buttrey accepted the invitation, and met with Col. Ryan on February 8, 1980.

The parties remained unable to resolve their differences. On April 2, 1980, the Corps issued an "Environmental Assessment" and an "Evaluation of the Effects of the Discharge of Dredged or Fill Material Into Waters of the U.S. Using the Section 404(b) Guidelines," and denied Buttrey's permit application. After extensively reviewing its evaluation process, Col. Ryan made the following "evaluation and findings":

> Based upon review of the application, conducting an environmental assessment, preparation of a 404(b) evaluation, and consideration of all comments by other agencies and the public, and after weighing all known factors involved in the proposed action, I find in concurrence with national policy, statutes and administrative directives, when the total adverse effects of the proposal are weighed against the benefit to the using public, the public interest would best be served by denial of the requested permit.

The Corps noted particularly that "the environmental effects associated with implementation of the proposal are significant and adverse."

One month later, having exhausted the procedures provided by the Corps of Engineers, Buttrey filed with the United States District Court for the Eastern District of Louisiana an action for damages and declaratory and injunctive relief. Buttrey's complaint asserted: (1) that the Corps had no jurisdiction over the project; (2) that even assuming the Corps had jurisdiction, its own regulations exempted the proposed project from regulation under section 404; and (3) that, as applied in this case, the Clean Water Act and

the regulations thereunder were unconstitutional. After a hearing on August 21, 1980, and upon consideration of the Corps' motion for a protective order and Buttrey's memorandum in opposition, the district court authorized the production of certain documents and the taking of depositions from Col. Ryan and Donald Conlon (Chief of the Regulatory Functions Branch). Both Buttrey and the Corps submitted motions for summary judgment and memoranda in support of their motions, and, following a hearing on the cross-motions, both parties submitted post-hearing memoranda "on the issue of whether an adjudicatory hearing is required when . . . the jurisdiction of the Corps . . . is challenged." On April 1, 1981, the district court issued its opinion denying Buttrey's motion for summary judgment and granting summary judgment for the Corps. The district court held:

> (1) where the Corps' regulatory jurisdiction over a proposed "dredge and fill" project is challenged, an adjudicatory hearing is not required for the purpose of determining the propriety of the jurisdictional claim;
>
> (2) the Corps has jurisdiction to require permit issuance for the project in question;
>
> (3) the procedures employed by the Corps in the processing of plaintiffs' permit were not unconstitutional;
>
> (4) on the basis of the administrative record, the permit was properly denied; and

(5) plaintiff's claim for damages, allegedly due to either an unconstitutional taking of property without compensation or, alternatively, for the delay plaintiff has incurred as a result of the Corps' permitting process, is denied.

Judgment was entered accordingly, and Buttrey now appeals.

On appeal, Buttrey contends that he was denied his constitutional and statutory rights because the Corps refused to grant him a trial-type hearing, that the administrative record was incomplete, that the procedures employed by the Corps in determining that it had jurisdiction were improper, and that the permit was arbitrarily and capriciously denied.

II. WHAT KIND OF HEARING?

Buttrey's claim that he was wrongfully denied a full trial-type hearing is both statutory and constitutional. The statutory claim is based on a reading of the Administrative Procedure Act, 5 U.S.C. §554(a) (1976), together with section 404(a) of what is now called the Clean Water Act, 33 U.S.C. §1344(a) (Supp. IV 1980). The constitutional claim is based on the due process clause. Because the statutory argument is the more straightforward, we shall address it first.

A. The Administrative Procedure Act.

The formal trial-type hearing procedures that Buttrey wants are set out in sections 7 and 8 of the Administrative Procedure Act, 5 U.S.C. §§556-557 (1976), and are triggered by language at the beginning of section 5: "This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an

agency hearing . . . ." 5 U.S.C. §554(a) (1976). Since in the present case the Corps has acted under the authority of section 404 of the Clean Water Act, the determinative issue is whether section 404 "require[s]" disputes to be "determined on the record after opportunity for an agency hearing." Buttrey claims that it does, and the government claims that it does not. We agree with the government.

Section 404 seems relatively simple. It says, quite plainly, that the Corps of Engineers "may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. §1344(a) (Supp. IV 1980). Buttrey argues that "public hearings" means the trial-type hearing provided for in the APA. There are, however, many different kinds of "hearing," and resolution of the issue must turn on "the substantive nature of the hearing Congress intended to provide." *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 94, 58 L.Ed.2d 117 (1978) (footnote omitted).

Three other circuits have construed virtually identical language in section 402 of the Clean Water Act, 33 U.S.C. §1342(a)(1)(1976) ("after opportunity for public hearing"), to require a trial-type hearing, *Seacoast, supra; Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). The question, then, is whether section 402 can be distinguished from section 404, despite the similarity of language and despite the fact that both sections are part of the same statutory scheme.

We begin with the observation that none of the three opinions construing section 402 held that the phrase found in

both sections–"after opportunity for public hearing[s]"–was so clear that there was no need to look behind it for other indications of congressional intent. *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, 218, 100 S.Ct. 1095, 1107, 63 L.Ed.2d 329 (1980) (commenting that statute's "opportunity for public hearing" requirement is "rather amorphous"). It is, moreover, very possible "for a term to have different meanings, even in the same statute." *Environmental Defense Fund, Inc. v. Costle*, 631 F.2d 922, 927 (D.C.Cir.1980) (footnote omitted), *cert. denied*, 449 U.S. 1112, 101 S.Ct. 923, 66 L.Ed.2d 841 (1981). We therefore look to the legislative history for help in determining what Congress meant when it called for "hearings" in section 404.

This is one of those rare instances when a statute's history leaves no room for doubt. Congress did not intend that the "public hearings" called for in section 404 be trial-type hearings on the record. When confronted with a choice between a House version of section 404, which invested permit authority in the Corps of Engineers, and a Senate version, which invested authority in the EPA, Congress consciously chose the House version. The Corps of Engineers had apparently been using its simplified procedures to issue dredge and fill permits (under a related statute) for many years. *See* Rivers and Harbors Appropriation Act of 1899, §10, 33 U.S.C. §403 (1976 & Supp. IV 1980). When Senator Muskie presented the Conference Committee report on the Senate floor, he explained:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.

118 Cong. Rec. 33,699 (1972) (prepared remarks of Sen. Muskie, presented on behalf of the Conference Committee but not delivered orally). Congress *consciously* chose to use the simplified permit procedures that the Corps had developed in administering its existing dredge and fill permit program. Congress did not intend to burden the implementation of section 404 with a trial-type hearing requirement, and we decline to do so today. *See, e.g., Nofelco Realty Corp. v. United States,* 521 F.Supp. 458 (S.D.N.Y. 1981) (also construing section 404 not to require trial-type hearings); *cf. United States v. Independent Bulk Transport, Inc.,* 480 F.Supp. 474, 480 (S.D.N.Y. 1979) ("The decision by Congress to confer authority for enforcement of section 1321(b)(6) upon the Coast Guard [rather than the EPA] reflects a desire to dispense with procedural intricacies.").

The subsequent history of the Clean Water Act reinforces our conclusion that section 404 does not require trial-type hearings. Congress amended section 404 and several other provisions of the Act in 1977, but again chose to leave the Corps' existing permit granting system intact. The Senate and House reports on the amendments both impliedly approved the Corps' section 404 regulations. S. Rep. No. 370, 95th Cong., 1st Sess. 80, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4326, 4405; H. R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 105, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4424, 4480. Their only overriding concern about the Corps' section 404 procedures seems to have been for eliminating delay and red tape in processing applications. *See, e. g.,* S. Rep. No. 370, at 80, reprint at 4405 (section entitled "Unnecessary regulation and red-tape"); H. R. Conf. Rep. No. 830, at 104, reprint at 4479 (recommended procedures "[t]o expedite the consideration of permit applications, and to avoid unnecessary delay"). Indeed, we note that advocates on the "in-

dustry" side of the water pollution controversy complain bitterly about the Corps' "complex and unnecessary permit processing procedures." Parish & Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L.Rev. 43, 78 (1982). In short, requiring trial-type hearings would do violence to the obvious congressional purpose of making section 404 processing procedures as simple as possible.

The "public hearings" language in section 404 was, in fact, written into the statute to protect the public, not permit applicants. As Professor Davis has pointed out, "when many are affected, [the term "public hearing"] usually means a speech-making hearing rather than a [trial-type] hearing with a determination on the record." 2 K. Davis, *Administrative Law Treatise* §12:7, at 434 (2d ed. 1979). This circuit has already decided that the "public hearings" referred to in the Corps of Engineers' dredge and fill permit regulations means the kind of "speech-making" hearing described by Professor Davis: "[I]f sufficient public interest is shown in [a] project, then the District Engineer of the Corps is authorized to conduct a public, informal hearing at which both proponents and opponents of the project are allowed to be heard." *Taylor v. District Engineer*, 567 F.2d 1332, 1338 (5th Cir. 1978) (construing 33 C.F.R. §209.120(g)(4) (superseded 1977)). *See also Sierra Club v. Alexander*, 484 F.Supp. 455, 470-71 (N.D. N.Y.), *aff'd mem.*, 633 F.2d 206 (2d Cir. 1980) (reason for public hearings by federal agencies is to elicit "input" from the public to assist agency in determining whether a proposed act is in the public interest). The current regulations are essentially the same as those construed in *Taylor*, *see* 33

C.F.R. §327.8 (1981), [1] and foreclose our reaching any conclusion different from the one reached in *Taylor*:

> Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed Department of the Army permit action, or Federal project, and which affords to the public the opportunity to present their views, opinions, and information on such permit actions or Federal projects.

33 C.F.R. §327.3(a) (1981). It therefore follows that "public hearing[s]" means exactly what the regulation says it means, and that Buttrey is thus not entitled under section 404 of the Clean Water Act and section 5 of the Administrative Procedure Act to insist on a trial-type oral hearing.

B. The Due Process Clause.

Buttrey's argument that he is nonetheless entitled

1/ The only really material difference between the old regulations, 33 C.F.R. §209.120(g)(4) (1972) (superseded 1977), and the current regulations, 33 C.F.R. §327.8 (1981), concerns the right of cross-examination. The old regulations provided that each party had the right to make a rebuttal statement, but that "cross-examination is not usually permitted." The current regulations also provide for rebuttal statements, but then add that "[c]ross-examination of witnesses shall not be permitted." Since the difference in actual practice between the old version and the new seems to be virtually non-existent, *see Regulatory Programs of the Corps of Engineers*, 42 Fed.Reg. 37, 122-23 (1977) (negative implication that the hearing procedures were not materially altered), we do not think that the difference affects our analysis.

to a trial-type hearing under the due process clause, U.S. Const. amend. 5, presents a much more difficult issue. While the government claims that Buttrey's dispute with the Corps is mostly legal and concerns only "legislative" facts and policy, Buttrey has continued to insist throughout these proceedings that the case turns entirely on precisely those kinds of narrowly defined questions of "adjudicative" fact that entitle an administrative litigant to an oral, trial-type hearing on the record. We agree with the government. Although the precedents holding that a party who directly challenges an agency's material factual determinations may nevertheless be denied a trial-type hearing have generally been written in the most limiting language possible, [2] we

---

2/ *See, e. g., Califano v. Yamasaki*, 442 U.S. 682, 696, 99 S.Ct. 2545, 2555, 61 L.Ed.2d 176 (1979) (oral hearing not required in case involving "relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes"); *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) (three-suspensions-and-you-lose-your-driver's-license rule held to be so narrow that oral hearing not required); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621, 93 S.Ct. 2469, 2479, 37 L.Ed.2d 207 (1973) ("We cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's 'pleadings' that the application cannot succeed."); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1068 (5th Cir. 1982) (commenting that "[c]ross-examination is . . . not an absolute right in administrative cases" partly because 127 of some 1600 witnesses already had been cross-examined); *ECEE, Inc. v. Federal Energy Regulatory Commission*, 645 F.2d 339, 352 (5th Cir. 1981) ("informal conference and written comment" provision enough to protect private interests in certain well-determination controversies); *Superior Trucking Co. v. United States*, 614 F.2d 481 (5th Cir. 1980) ("paper hearing" is enough to protect party protesting interlocutory injunction in ICC licensing case). The following is typical of the kinds of caveats that appear in all the cases: "In short, all we hold today is that in *this* case, on *these* facts, *this* plaintiff was not denied due process of law by the City's procedure *as here applied*." *Basciano v. Herkimer*, 605 F.2d 605, 612 n.8 (2d Cir. 1978) (trial-type hearing not required only on facts of case sub judice) (emphasis in original), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d 296 (1979).

find that under the facts of this case, and under the Corps' regulations as applied here, Buttrey's "paper hearing" gave him all the process which was due him.

The starting point for any inquiry into how much "process" is "due" must be the Supreme Court's opinion in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[3] Implicitly adopting the three-part analysis developed by Judge Friendly the previous year, Friendly, "*Some Kind of Hearing*," 123 U.Pa.L.Rev. 1267, 1278 (1975), the Court set out the three most important considerations that a court should balance:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903 (citation omitted). The

3/ We note parenthetically that although there is a Fifth Circuit opinion almost directly on point, *Taylor v. District Engineer*, 567 F.2d 1332, 1338 (5th Cir. 1978) (upholding the Corps' permit granting procedures against a due process challenge), we choose not to rely on it as the exclusive support for our decision. The opinion in *Taylor* briefly noted that the Corps' regulations, as applied in that case, were constitutional, but did not refer to *Eldridge* or any of the other due process cases. While we fully agree with the end result in *Taylor*, we think that the most prudent course—in this area where so much depends upon the facts of each case—is to undertake a full analysis of the question ourselves.

first and third considerations pose the fewest problems.

Buttrey clearly has a strong "private interest" in turning what is now commercially worthless swampland into residential homes, which he could then sell. It is equally clear that he is also not a person "on the very margin of subsistence" and that denial of his application will not deprive him of "the very means by which to live." 424 U.S. at 340, 96 S. Ct. at 905. The government, moreover, is doing nothing more than denying him a permit; it is not taking action against him. The distinction is important, for, as Judge Friendly has remarked, "[r]evocation of a license is far more serious than denial of an application for one; in the former instance capital has been expended, investor expectations have been aroused, and people have been employed." Friendly, *supra*, at 1296. The government, in other words, has not taken anything of Buttrey's and made it worth less; rather, it has merely told Buttrey that (at least under his current proposal) he must keep what he has without attempting to make it worth more. This distinction, we hasten to add, is not a disguised attempt to revive the discredited doctrine of "rights" and "privileges." We draw the distinction merely in an attempt to determine, in the words of the *Eldridge* opinion, what weight we should give to "the private interest that will be affected by the official action," 424 U.S. at 335, 96 S.Ct. at 903. And like the *Eldridge* court—which decided that the disabled worker was entitled to less process than the welfare recipient-we decide that Buttrey's interest, while important, is not great enough to demand the imposition of full trial-type procedures without further careful analysis.

The third *Eldridge* consideration, also fairly uncomplicated, demands that we examine the "fiscal and administrative burdens" that trial-type proceedings would entail. 424 U.S.

at 335, 96 S.Ct. at 903. We understand that a routine imposition of trial-type procedures on the Corps would entail a substantial, and probably unbearable burden. Col. Ryan has testified that the Mobile District alone processes some 1200 applications per year, Ryan Deposition at 18, and the government has informed us that the Corps presently has *no* administrative law judges assigned to it. Brief for Appellee at 21 n.13. Trial-type hearings, if routinely or even often granted, would not simply impose a "burden" on the Corps. Such a requirement in all likelihood would make it impossible for the Corps to carry out its Congressional mandate under section 404 at all. The Corps' situation is not atypical. In connection with a related water pollution control program, for instance, the Supreme Court has emphasized that if the EPA were required to grant oral hearings in "most" of its 2200 yearly applications, there would be "serious questions about the EPA's ability to administer the . . . program." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 215, 100 S.Ct. 1095, 1105, 63 L.Ed.2d 329 (1980). These facts lead us to conclude that absent fairly unusual circumstances, and under the present regulations as applied in this case, the Corps should not be required routinely to grant requests for trial-type hearings.

Finally, the second and most complicated *Eldridge* consideration requires us to balance "the risk of an erroneous deprivation of [the administrative litigant's] interest through the procedures used" against the "probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S.Ct. at 903.

We preface what follows with a word of warning. Any inquiry under the second *Eldridge* heading must necessarily be very fact-specific. A procedure that seems perfectly reasonable under one set of circumstances can, with only

a slight modification of the facts, suddenly "smack . . . of administrative tyranny." *Larry v. Lawler*, 605 F.2d 954, 962 (7th Cir. 1978). This area of the law therefore ill-lends itself to sweeping generalizations, and all the less so because of the variegated contexts in which the problems arise: high-stakes administrative cases such as the present one, where each side is skillfully represented by experienced counsel and where no expense is spared, little resemble the context in which many of the leading cases have arisen. Many of the leading decisions are social security, welfare, or similar cases, where the plaintiffs may not be represented by counsel and may not fully understand their rights. The only truly general principle that appears in all the decisions seems to be that the more articulate an administrative plaintiff is likely to be, the more chances he has effectively to rebut the agency's case against him, and the more his "factual" objections shade over into the area of legislative fact and policy, the less likely it is that he will be entitled—depending upon the entire three-part *Eldridge* test—to a full trial-type hearing, held on the record with a right to cross-examine witnesses. Each case, in other words, will depend upon the nature of the facts challenged and upon the effectiveness of the procedures afforded the plaintiff for challenging them. [4]

4/ In a case such as the present one, where the plaintiff has already been afforded an extensive "paper hearing," the threshold issue is whether he can "understand the case against him and . . . present his arguments effectively in written form." *Friendly*, *supra*, at 1281. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970) ("Written submissions are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."); *Gray Panthers v. Schweiker*, 652 F.2d 146, 156 (D.C. Cir. 1981) (same). Since, as we have intimated above, Buttrey has been skillfully represented by experienced counsel throughout these proceedings, we need not concern ourselves with the kinds of questions that troubled the courts in *Goldberg* and *Gray Panthers*.

The procedures adopted by the Corps of Engineers in reviewing Buttrey's section 404 permit application afforded him considerable protection. The Corps in effect gives applicants a "paper hearing." After public notice of the pending application has been given, the Corps usually receives numerous comments from other federal agencies and the interested public. As the comments arrive, they are (and were in this case) immediately forwarded to the applicant. The pertinent regulation provides:

> The applicant must be given the opportunity to furnish the District Engineer his proposed resolution or rebuttal to all objections from Government agencies and other substantive adverse comments before final decision will be made on the application.

33 C.F.R. §325.2(a)(3) (1981). Understandably eager to write the most effective rebuttal possible, Buttrey asked for and got six months within which to prepare his response. It ultimately included a ten-page memorandum of law, a nine-page technical analysis by a biology professor at Tulane University, and an elaborate engineering analysis commissioned from a consulting engineer. Buttrey also demanded and got a chance to meet informally with the District Engineer, Col. Ryan. At the end of all this, the Corps nevertheless decided to deny the application. Col. Ryan filed three detailed documents supporting and explaining his decision: a four-page "Environmental Assessment," *see* 33 C.F.R. §325.2(a)(4), a three-page evaluation of the project under the Corps' section 404(b) or "wetlands" guidelines, *see* 33 C.F.R. §325.2(a)(6); 40 C.F.R. §230, and an eight-page document entitled "Findings of Fact," reviewing all of the documents and information used in reaching the decision, *see* 33 C.F.R. §325.–2(a)(6). These

three documents were then mailed to Buttrey pursuant to 33 C.F.R. §325.2(a)(7).

All of this is, we think, a great deal of "process." The question only remains whether the imposition of trial-type procedures could reduce the risk of error enough to make the reform worth the cost.

The particular facts of this wetlands controversy now become critically important. Buttrey complains generally, first, that "there is no scientific basis for the conclusions" reached in Col. Ryan's findings of fact, Appellant's Initial Brief at 9, and second, that his proposed project would *not* have "adverse environmental impact," Appellant's Reply Brief at 3. He also makes two more specific factual arguments. He claims, first, that his project will *not* lessen downstream water quality, Initial Brief at 14, and second, that his project is necessary to prevent flooding in his adjacent Magnolia Forest subdivision, Initial Brief at 16, 30. Buttrey freely concedes that he is claiming, in effect, that "[i]f the Corps' facts were true, [I] would have no case." Reply Brief at 3. For Buttrey, this case is all about these few specific questions of "adjudicative" fact. *See* Reply Brief at 9-10 (conceding that the facts listed in this paragraph are the only essential ones in dispute). For Buttrey, in short, this case involves no policy questions, no broader questions of "legislative" fact. *See id.*

We think that Buttrey has fundamentally misconceived the purpose of section 404 of the Clean Water Act, and further, that he does not understand the nature of the Corps' administrative process. [5]

5/ Buttrey contends, for instance, that the Corps' denial of his permit application is invalid partly because it remains "totally unsupported by any admissible evidence." We reject this argument for the reasons

Section 404 of the Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a) (1976) (section entitled "Congressional declaration of goals and policy"). Certain value judgments have already been made. The regulations promulgated pursuant to the Act—whose substantive (rather than procedural) validity Buttrey does not challenge—expressly prohibit exactly the kind of factual maneuvering Buttrey is attempting to engage in.

Before issuing any dredge or fill permit, the Corps is required to conduct a "public interest" review. This review considers virtually all respects of a project: "conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. §320.4(a)(1) (1981). The regulations further provide that the review may not be "piecemeal"—a few acres here, a small tract there. The rationale is simple. "Although a particular alteration of wetlands may constitute a minor change", the regulations note, "the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources." 33 C.F.R. §320.4(b)(3). Specifically, "[w]hen disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in

---

5/ Continued
given in W. Gellhorn, C. Byse & P. Strauss, *Administrative Law* 730-51 (7th ed. 1979) (collecting and analyzing cases). The leading Supreme Court decision is *Richardson v. Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L.Ed.2d 842 (1971) (hearsay evidence may constitute "substantial evidence" for purposes of reviewing agency action). Buttrey cites no cases holding to the contrary.

major losses through secondary impacts." 40 C.F.R. §230.41 (b) (1091). The regulations further state that the Corps shall begin its analysis of a proposed project with the presumption that the "unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest." 33 C.F.R. §320.4(b)(1). This presumption is *very* strong. *See* 40 C.F.R §230.1(d) ("The guiding principle should be that degradation or destruction of special sites ["such as filling operations in wetlands"] may represent an irreversible loss of valuable aquatic resources"). To overcome it, an applicant must make three very difficult showings: first, that "the benefits of the proposed alteration outweigh the damage[s]," second, that "the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment," and third, that the proposed project cannot be located on any "feasible alternative sites." 33 C.F.R. §320.4(b)(4). In light of all of the above, it would hardly be putting the case too strongly to say that the Clean Water Act and the applicable regulations do not contemplate that wetlands will be destroyed simply because it is more convenient than not to do so. *See* 40 C.F.R. § 230.1(c). Congress and the agency have already determined that "[w]etlands are vital areas that constitute a productive and valuable public resource," 33 C.F.R.§320. 4(b)(1); *see* 33 U.S.C. §1251 (1976), and Buttrey may not challenge that determination here.

Buttrey has nevertheless attempted to challenge these policies indirectly by presenting his objections in the guise of arguments about "adjudicative" facts. He argues, for instance, that the Corps should have considered the public benefits of the $3 million or so in public jobs that the construction of his proposed housing addition would create. Appellant's Initial Brief at 13. But this is not the kind of

"economic" benefit the Corps' public interest review is supposed to consider. *See Regulatory Programs of the Corps of Engineers*, 42 Fed.Reg. 37, 122, 37, 122, 37, 125-26 (1977) (reviewing history and purpose of the "public interest" review process). Again, Buttrey claims that his project will not harm the environment because the 40 acres at stake in this lawsuit are a "mere flyspeck" in relation to the entire Pearl River watershed. *See* Appellant's "Memorandum of Law in Support of Section 404 Permit Request" at 10, Administrative Record at tab 29. Stripped of its "adjudicative" fact disguise, this "factual" objection amounts to a demand that the Corps engage in precisely the kind of limited review of "piecemeal changes" that the regulations forbid. 33 C.F.R. §320.4(b)(3) (quoted in the preceding paragraph).

Buttrey's related contention that his project would not lessen downstream water quality is also, in effect, no more than an assertion that the policies set out in the Corps' wetlands regulations are fundamentally unsound. His argument manifestly does not concern "adjudicative" facts.

Part of the confusion about the water quality issue stems from the fact that the parties have confused two related questions - suspended silt pollution from the dredging operations themselves and the long term effects from the loss of the purifying natural filtration function of wetlands. Buttrey insists that water quality is an issue, but the only evidence he has presented is a letter, dated February 19, 1979, from the Louisiana Stream Control Commission stating that "water quality standards of the State of Louisiana will not be violated provided turbidity during dredging in public waters is kept to a practicable minimum." This is a complicated way of saying that the Stream Commission is worried that dredging may muddy the waters, but that the problem is not severe enough to warrant cancelling the

project. A glance at the statutory authority pursuant to which the letter was written reinforces this impression. The letter refers to a Louisiana statute, 1975 La.Acts 712 (codified at 56 La.Rev.Stat.Ann. §1439(5)) (repealed 1980), and to sections 303 and 401 of the Clean Water Act, 33 U.S. C. §§1313, 1341 (1976 & Supp. IV 1980). [6] But all of these statutes concern only water pollution[7] –an issue that has nothing at all to do with the unique role that wetlands play in purifying water. *See* 33 C.F.R. §320.4(b)(2)(vii) (1981) ("Wetlands through natural water filtration processes serve to purify water."); 40 C.F.R. §230.41(b) (same). The Corps, on the other hand, has found that Buttrey's project would have "an adverse impact on . . . a wetland having significant functions of water quality maintenance." Attachment 2 at 2, Findings of Fact, Administrative Record at tab 48. Beyond his general assertion that his forty-acre wetland is too small to matter to anyone, Buttrey has not challenged this determination. The material facts about downstream water quality therefore remain undisputed.

6/ The letter also mentions section 404 of the Clean Water Act, which was not then applicable to Louisiana. The 1977 additions to section 404 do provide for coordination with approved state regulatory schemes, but Louisiana did not establish such a plan until 1980, *see* 30 La.Rev. Stat.Ann. §§1091-1096 (West Supp. 1982) (state regulation of "dredge and fill" operations to begin Jan. 1, 1980).

7/ Although the Louisiana statute cited in the text, 1975 La.Acts 712 (repealed 1980), refers to five federal statutes, all five concern only "water pollution" in the traditional sense, not the kind of water-quality lessening that occurs after the completion of dredge and fill operations in wetlands; moreover, the letter itself makes clear that it is concerned only with the "water quality standards of Louisiana provided for under Section 303" of the Clean Water Act. Section 303. 33 U.S.C. §1313 (1976), in turn, also only concerns itself with "effluents" and other forms of water pollution in the traditional sense.

Buttrey complains that these findings nevertheless lack a "scientific basis." We think that once one accepts the value judgments already made in section 404 and in the regulations thereunder, the "scientific" basis of the Corps' findings in this case becomes clear.

Buttrey's last factual contention poses a more difficult problem. While he insists that the proposed project will help prevent flooding in the adjacent Magnolia Forest subdivision, several of the public commentators have declared with equal vigor that the bayou does not present a flooding problem even in its present "unimproved" state. Although the regulations do require the Corps to consider "flood damage prevention" in making its public interest review, 33 C.F.R. §320.4 (a)(1) (1981), the Corps concluded only that "[d]ata submitted [are] insufficient to determine what impact the project will have on potential downstream flooding." Attachment 1, at 2, Findings of Fact, Administrative Record at tab 48. Indeed, while the two-inch thick administrative record in this case contains no probative evidence about the flooding controversy, 8/ the regulations suggest that destroying wetlands may *increase* the chances of local flooding. *See* 40 C. F. R. §230.41(b) (1981). If Buttrey wanted the Corps to appreciate the full danger that the bayou posed to his Magnolia Forest subdivision, he should have presented evidence on the issue. Having chosen not to do so, he cannot now fairly complain that he was denied procedural due process because the data were insufficient.

8/ The record does contain a report from Buttrey's consulting engineer, Ivan Borgen, recommending that the bayou be dredged "to minimize flooding within portions" of the Magnolia Forest subdivision, but the report simply states its conclusion without explanation. Nothing in the record indicates when the bayou has flooded in the past, how bad the flooding was, what kind of damage was done, or if it seems likely that similar damage is to be expected if Buttrey's project is not allowed to proceed.

Against this factual background we must now assess "the probable value. . . of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S.Ct. at 903. We conclude that additional procedural safeguards, including the imposition of trial-type procedures, would do virtually nothing to reduce the chances of error.

The regulations themselves—and again we stress that Buttrey has not even mentioned their *substantive* provisions—in effect foreclose the kinds of "factual" arguments Buttrey has made throughout these proceedings. *See generally* Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 Calif.L.Rev. 14 (1976) (recommending that agencies draft fact-specific regulations to eliminate as many full adjudications as possible). Congress and the Corps have wisely decided that each litigant should not be able to insist upon a de novo determination of the value of wetlands to the American public. The rationale, as expressed by Professor Davis, seems to be that "evidentiary hearings are usually appropriate only for resolving disputes about facts pertaining to a particular party and are usually inappropriate for resolving other kinds of questions, such as questions of law, policy, discretion, or broad and general facts that help decide questions of law or policy." 2 K. Davis, *supra*, §13:6, at 237 (Supp. 1982). In any event, we think that disputes over "the 'legislative' facts and the proper formulation of policy or interpretation of law to be applied to the case" are best resolved through simple submission of carefully considered written arguments. *See* Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 Harv.L.Rev. 612, 630-31 (1971) (footnote omitted).

Even if this case did depend upon conflicting scientific testimony, as Buttrey claims it does, the right of cross-

examination provided by full trial-type procedures would probably serve little purpose. Many courts and commentators have concluded that cross-examination of scientific witnesses in a case of this sort is often, if not always, an exercise in futility. *See, e.g., Eldridge, supra,* 424 U.S. at 343-44, 96 S.Ct. at 907 (noting probable worthlessness of opportunity to cross-examine expert physician specialists); *Basciano v. Herkimer,* 605 F.2d 605, 610-11 (2d Cir. 1978) ("[T]he value of cross-examination to discredit a professional medical opinion at best is limited."), *cert. denied,* 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d 296 (1979); 3 K. Davis, *supra,* §15:10, at 184 (2d ed. 1980) (recommending that cross-examination be "rarely allowed" in cases involving mixtures of legislative fact and judgment); Ames & Mc Cracken, *supra,* at 35 ("Cross-examination. . . will be most cumbersome when the issues are complex. . . ."); Friendly, *supra,* at 1285 ("in many such ["recondite scientific or economic"] cases the main effect of cross-examination is delay."); Korn, *Law, Fact and Science in the Courts,* 66 Colum.L.Rev. 1080, 1086-87 (1966) (the value of cross-examination "is often negligible where the dispute turns on matters of expert judgment rather than veracity"); *but cf.* Boyer, *Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 Mich. L. Rev. 111, 127-28 (1972) noting controversial nature of cross-examination of expert witnesses).

Buttrey has, moreover, apparently decided not even to attempt to make the three showings required under 33 C.F.R. §320.4(b)(4) (1981).[9] Procedural improvements in the nature of trial-type safeguards could do nothing to remedy so fundamental a flaw in the prima facie case. *See Weinberger v. Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 620,

9/ *See* text slip op. at 545, —F.2d — *supra.*

93 S.Ct. 2469, 2478, 37 L.Ed.2d 207 (1973) (agency not required to "provide a formal hearing where it is apparent at the threshold that the applicant has not tendered *any* evidence which *on its face* meets the statutory standards as particularized by the regulations").

Finally, Buttrey has been given an oral hearing with Col. Ryan, the District Engineer ultimately responsible for deciding not to issue the section 404 permit. Although Buttrey has intimated that because this meeting was informal and off-the-record it somehow does not "count" in the due process analysis, the courts have unanimously concluded that this kind of informal meeting can often be very important in ensuring that due process is given. The Supreme Court in *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 18, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978), for example, has said that "[t]he opportunity for a meeting with a responsible employee empowered to resolve the dispute" could in some instances be enough of a hearing even without written submissions. *See Goss v. Lopez*, 419 U.S. 565, 583, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975) (providing for informal meetings in school discipline cases); *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970) ("Informal procedures will suffice."); *Gray Panthers v. Schweiker*, 652 F.2d 146, 166, 169 (D.C. Cir. 1981) ("opportunity for informal oral consultations" is enough). The present case is clearly not one where the agency is attempting to hide behind a faceless, bureaucratic mask to avoid having anyone take direct responsibility for an unpopular decision. The Corps has fully and directly justified its action. *See* 2 K. Davis, *supra*, §12:12, at 458-59 (2d ed. 1979) (noting the importance of face-to-face meetings with the agency in maintaining public trust and confidence in accuracy of agency's administrative system). We do not, however, hold that the due process clause requires this kind

of informal oral hearing in every case. We merely note that in *this* case, Buttrey has been afforded virtually every "process" short of a full trial-type hearing.

We hold, in sum, that Buttrey's property interest, while important, is not overwhelmingly so; that the Corps' paper hearing procedures, with an informal face-to-face meeting, provided Buttrey with a great deal of procedural due process; that imposing a requirement of trial-type procedures, with oral cross-examination of witnesses, would probably not reduce the chance of error; that trial-type proceedings would in any event be prohibitively expensive and so cumbersome as to make it virtually impossible for the Corps to carry out its statutory mandate; and finally, that, after weighing all of these considerations in the balance, Buttrey was given all the procedural protections to which he was entitled under the due process clause of the Constitution. Under the facts of this case, any greater procedural requirements would simply not be worth the cost.

III. THE DENIAL OF THE PERMIT.

In addition to challenging the procedures used by the Corps to process the permit application, Buttrey challenges the determination itself. He contends that it was arbitrary, capricious, and not in accordance with law in that it was not based on a consideration of all of the relevant facts. *See* Administrative Procedure Act § 10(e), 5 U.S.C. §706 (1976). Under this standard of review, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). We also bear in mind, as the Supreme Court has emphasized, that "[a]lthough this inquiry into the facts is

to be searching and careful, the ultimate standard of review is a narrow one. [A] court is not empowered to substitute its judgment for that of the agency." *Id.*

Buttrey contends that the Corps in fact ignored the following information: (1) evidence that water quality standards of the State of Louisiana would not be violated; (2) evidence that the proposed project would enhance the aesthetics of the area and improve recreational opportunities; (3) evidence that the project would reduce the chances of flooding and that it had been endorsed by the State of Louisiana as an approved drainage project; (4) evidence that by eliminating mosquito breeding areas, the proposed project would decrease health problems in the area; and (5) evidence that the project would provide economic benefits to the area of approximately $3 million during construction and would place the property on the tax rolls. Appellant's Initial Brief at 14-17. For all of these contentions, Buttrey relies primarily on the deposition testimony of Col. Ryan and Donald Conlon (the Chief of the Regulatory Functions Branch), the taking of which the district court had authorized for purposes of determining the Corps' jurisdiction.

Although the depositions were taken only for that limited purpose, Buttrey maintains that some of the responses prove that the Corps acted arbitrarily and capriciously in making its decision. The propriety of thus going outside the administrative record has been discussed in *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). There, the Supreme Court stated that the courts were forbidden from undertaking a de novo inquiry on appeal from an agency decision that had already produced a reviewable record. 411 U.S. at 143, 93 S.Ct. at 1244. The Court added:

> The validity of the [agency's] action must,

> therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [it] for further consideration.

Id. As in *Pitts*, the decision here was accompanied by a contemporaneous explanation. We therefore look only to the administrative record in order to determine if the Corps' decision was arbitrary, capricious, or not in accordance with law.

The Environmental Assessment accompanying the Corps' findings of fact made the following points:

> *a. **Biological.*** This proposed action will result in the permanent destruction of approximately 40 acres of tupelo gum swamp resulting in loss or wetland functions considered valuable to the public interest. There will be an increase in turbidity of the water at and downstream of the proposed site during the construction activity.
>
> The cumulative effects of this proposed activity will seriously impact the remainder of Gum Bayou and possibly the West Pearl River.
>
> Data submitted [are] insufficient to determine what impact the project will have on potential downstream flooding.

b. Socioeconomic. The impact should be minimal, however social and/or economic changes could occur over a long period of time.

c. Aesthetics. The proposed activity will destroy the natural features of the existing tupelo gum swamp.

d. Land Use. The proposed activity would change the land use of the existing gum swamp. However, the development of residential lots would be consistent with the land use of the adjacent subdivision.

e. Air Pollution. As a result of the proposed activity changes in air quality could occur due to increased usage of the area.

f. Noise. Noise levels would increase in the area during the construction process. Average noise levels would increase gradually in the area following the completion of the proposed activity due to an increase in residences and an increase in traffic.

The assessment also asserted that "[a]pproximately 40 acres of substrate [would] be removed or filled, destroying the organisms inhabiting and frequenting this area." The "Evaluation of the Effects of the Discharge of Dredged or Fill Material into Waters of the U.S. Using the Section 404(b) Guidelines," which also accompanied the Corps' findings of fact, then enumerated the costs and benefits that the Corps weighed before determining that the permit application should be denied.

The Corps' decision must, in the words of the Supreme Court, "stand or fall," 411 U.S. at 143, 93 S.Ct. at 1244, on the issue of whether it acted arbitrarily and capriciously in finding that when the total adverse effects of the proposal are weighed against the benefit to the public, the public interest would best be served by denial of the requested permit. A careful review of the record does not indicate that the Corps failed to consider all the facts. Comments favorable to the proposal were included in the record and were individually acknowledged by the Corps in its findings. Nonetheless, the Corps, after considering all the facts, found that the costs of the project outweighed its potential benefits and that the public interest would best be served by denying the permit. We do not consider this conclusion arbitrary, capricious or not in accordance with law.[10]

IV. THE CORPS' WETLANDS DETERMINATION.

Buttrey also challenges how the Corps determined that "wetlands" were involved and the failure of the district

---

10/ In addition to contending that the Corps failed to consider all relevant factors, Buttrey contends that the district court failed in its duty to review the agency action to ascertain that the relevant factors had been considered. We find no support for this assertion. The district court expressly concluded that the public interest was neither ignored nor dishonored, despite the fact that Buttrey made much of the Corps' failure to articulate meaningfully those public interests which, by statute and regulation, it must consider in the permit process. The district court accompanied this conclusion with a quotation from *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C.Cir.), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976), to the effect that the court must determine whether the agency decision was rational and based on consideration of the relevant factors.

court to engage in its own substantial inquiry. The Corps found that Buttrey's proposal would destroy wetlands and therefore lessen the water quality associated with a freshwater swamp and stream. Although Buttrey concedes that his bayou is a wetland, he insists that the Corps never determined the extent of the wetlands involved or what, if any, impact the proposed project would have on "wetlands." The Corps' Environmental Assessment, however, states that the proposed action would result in the destruction of approximately 40 acres of tupelo gum swamp resulting in loss of wetland functions considered valuable to the public interest. The essence of Buttrey's complaint is that the Corps itself conducted no tests in determining wetlands jurisdiction and instead relied on information supplied by other individuals and agencies. Buttrey has failed to show, however, that anything more was required. He does not deny that the Corps' finding of wetland status is correct. Reports from the Fish & Wildlife Service, the Environmental Protection Agency and the National Marine Fisheries Service all described the area as a wetland. There is, therefore, sufficient basis for us to uphold the Corps' "wetlands" finding under the "arbitrary and capricious" standard of review.

Buttrey also urges that, because the determination of wetlands status goes to the Corps' jurisdiction, the district court erred in refusing to engage in its own substantial inquiry into the extent of the wetlands and the environmental impact of the project. Again we disagree. Buttrey does not argue that the Corps' regulations improperly define wetlands. To determine, then, that the Corps had acted within the scope of its authority, the district court needed only to find that the Corps "could have reasonably believed" that the factual predicate necessary to its assertion of authority existed. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416,91 S.Ct. 814, 823, 28 L.Ed.2d

136 (1971). At that point, the factual findings that form the basis of the Corps' decision become reviewable, as indicated above, under the "arbitrary and capricious" standard of review. We conclude that the Corps' decision is neither arbitrary nor capricious.

AFFIRMED.

APPENDICE B

John BUTTREY and John Buttrey Developments, Inc.,
Plaintiffs-Appellants,

v.

UNITED STATES of America, et al.,
Defendants-Appellees.

No. 81-3649

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1982.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

Plaintiffs-Appellants John Buttrey and John Buttrey Developments, Inc., are developers of a subdivision in Slidell, Louisiana, known as Magnolia Forest. On May 5, 1980, the United States Army Corps of Engineers issued a cease and desist order advising Buttrey that his placement of a fill in a wetland area was regulated by the Corps and that initiating such work without a permit violated section 404

of the Clean Water Act, 33 U.S.C. §1344 (Supp. IV 1980).[1/] On November 21, 1980, the Corps issued another cease and desist order advising Buttrey that his construction of a levee and dredging in a wetland area adjacent to the Morgan River were similarly regulated by the Corps and that initiating such work without a permit violated section 10 of the Rivers and Harbors Act, 33 U.S.C. §403 (1976), and section 404 of the Clean Water Act.

In response to these cease and desist orders, and to alleged Corps' surveillance, unannounced inspections and presence, Buttrey filed a complaint for declaratory and injunctive relief on January 21, 1981. Count I of the complaint alleged that "Congress' grant of jurisdiction to the United States Army Corps of Engineers, over the private property and private activities of United States citizens is in violation of the United States Constitution" and that "the United States Army's entry onto plaintiffs' property and surveillance of plaintiffs activities, under the circumstances described herein, violate plaintiffs' constitutional rights." Counts II and III related to the merits of the specific cease and desist orders, count IV challenged the legality of the Corps' inspection of Buttrey's property and surveillance of his activities, and count V alleged unlawful refusal by the Corps to make its files relating to Buttrey available to him.

On August 14, 1981, Buttrey filed a motion for summary judgment on the issue of the Corps' lack of jurisdiction under section 404 and the illegality of the cease and desist orders

---

1/ Section 404, 33 U.S.C. §1344, provides, in pertinent part: The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

issued. The Corps, on August 20, 1981, filed a motion for summary judgment on count I and a motion to dismiss counts II through V. Following an oral hearing on these cross-motions, the district court granted the Corps' motion for summary judgment on count I,[2] denied the Corps'

2/ In granting the Corps' motion, the district court stated:

> [P]erhaps one of the first functions that the United States Government undertook in even its very infancy was the improvement of navigable waterways, followed by the expansion of flood control. This has, historically a civil function, been assigned to the United States Corps of Engineers by the Congress. Indeed there exists within the United States Army Corps of Engineers a civil functions division. And if the Court's memory is correct, the appropriations provided by the Congress to the Corps of Engineers for these functions are characterized as appropriations, Army Corps of Engineer civil functions.
>
> The Court believes that the exercise of the power of the Congress to control floods and provide flood control works emanates from the commerce clause of the Constitution, the very same clause which finds, and upon which is founded the Government's authority in this instance, to attempt to regulate and deal with navigable waters and adjacent wetlands.
>
> Therefore, the Court can perceive no difference insofar as the source of the power is concerned between such things as flood works, which have historically been performed by the Corps of Engineers under the commerce clause, and these functions which have been assigned by the Congress to the Corps of Engineers pursuant to power granted it under the commerce clause. Therefore, the Court finds no impropriety in this particular aspect of the civil arm of a military agency, the Corps of Engineers engaging in a civil function. And whether that civil function would be the exercise of flood control functions under the commerce clause, whether it's in the exercise of Section 10 permitting power under the

motions to dismiss counts II through IV and dismissed count V as moot.[3]

On October 13, 1981, the district court, pursuant to Fed. R.Civ.P. 54(b), ordered that the clerk of the court enter a final judgment upon the order dismissing count I of the complaint, certifying that there was no just cause for delay. Buttrey appeals that judgment.[4] The single issue on appeal is the constitutionality of Congress' delegation of the authority embodied in section 404 of the Clean Water Act to the Corps of Engineers, a part of the United States Army.

Section 404 of the Clean Water Act authorizes the Secretary of the Army, through the Chief of Engineers, to regulate the discharge of dredged or fill material into the nation's navigable waters. *See* note 1 *supra.* Buttrey contends that

---

2/ Continued

> River & Harbor Act, or Section 403 and 404 authority, or either or both under the Federal Water Pollution Control Act and Clean Water Act, the Court sees no essential difference.
>
> This is not the kind of thing which would offend the historically dominant and constitutionally required separation of military and civil power, and the supremacy of the civil power over the military power; and, accordingly, the motion for summary judgment by the plaintiff is denied. The motion for summary judgment on this count by the defendant is granted.

3/ The Corps produced the requested documents after the filing of the complaint.

4/ This case was consolidated on appeal with *Buttrey v. United States*, No. 81-3234, slip op. p. ____, ____ F.2d ____ (5th Cir. 1982).

section 404 of the Clean Water Act unconstitutionally permits the military to assert authority and control over civilians. He contests neither Congress' power to pass legislation under the commerce clause aimed at curbing the nation's pollution problems, nor the delegation of authority to the Corps under section 10 of the Rivers and Harbors Act, 33 U.S.C. §403 (1976).[5] He challenges only the fact that sec-

5/ Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

While the Clean Water Act delegated permit authority with respect to other discharges of pollutants into the Nation's navigable waters to the EPA, section 404 of the Clean Water Act retained permit authority with respect to dredged or fill material in the Corps, extending the Corps' jurisdiction with respect to such operations as far as possible. *See* S.Rep.No. 95-370, 95th Cong., 1st Sess. 75, *reprinted in* 1977 U. S. Code Cong. & Ad. News 4326, 4400.

tion 404 delegates jurisdiction to "a part of the military," as a regulatory agency.

Buttrey argues that Congress' total power with regard to the military can be found in article I, section 8, of the United States Constitution. Nowhere, he argues, is Congress given the power to use the Army to enforce compliance with laws or regulations not essential or necessary to the purpose of an Army. In addition, he argues that such legislation is contrary to what Justice Earl Warren once referred to as "the American tradition of the separation of the military establishment from, and its subordination to, civil authority." Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, 183 (1962).

The provisions of article I, section 8, of the Constitution give Congress the power "to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies." *See* Warren, *supra*, at 185. Buttrey cites several cases limiting the authority which Congress can extend to the military under these "war power" provisions of the Constitution.[6] The authority of the Corps to regulate the discharge of dredged or fill material into the nation's navigable waters, however, is founded not in these war power

---

6/ *See O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed. 2d 291 (1969); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1969); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960); *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955); *Ex Parte Milligan*, 71 U.S. (4 Wall) 2, 18 L.Ed. 281 (1866).

provisions, but in the commerce clause.[7] The necessary and proper clause, U.S.Const. art. I, §8, cl. 18, "authorizes Congress 'to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,' . . . and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances,' " *Atkins v. United States*, 556 F.2d 1028, 1061 (Ct.Cl. 1977) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-20, 4 L.Ed. 579 (1819)). Buttrey has conceded for purposes of this appeal that the end of this legislation–"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" –is legitimate. 33 U.S.C. §1251(a) (1976). He has also conceded the appropriateness of the means, except to the extent that it employs the Corps of Engineers in the administration of the program. Recognizing the Corps' expertise and existing administrative machinery, Congress chose administration by the Corps as the means to achieve its legislative end.[8] The end being legitimate and the means being plainly adapted to that end, we are left only with the question whether the administration of the permit program by the Corps comports with the letter and spirit of the Constitution.

7/ *See, e. g., Leslie Salt Co. v. Froehlke*, 403 F.Supp. 1292, 1296 (N.D.Cal. 1974), *reversed and modified on other grounds*, 578 F.2d 742 (9th Cir. 1978) ("[T]he Congress, enacting the [Clean Water Act], was exercising its powers under the commerce clause. . . .").

8/ In presenting the conference committee report to the Senate, Senator Muskie noted:

> The Conferees were uniquely aware of the process by which dredge and fill permits [under section 10 of the Rivers and Harbors Act of 1899] are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.

118 Cong. Record 33,699 (1972).

Two facts distinguish this case from those relied on by Buttrey to argue that Corps jurisdiction is unconstitutional. The first is that the constitutional authority for this legislation is the commerce clause, not the war power clauses; the second is that administration by the Corps does not infringe upon any other provisions of the Constitution. Because we find that the delegation of authority attacked here has a source in the Constitution independent of the war powers clauses and does not infringe upon any constitutional interests, we conclude that it is constitutional.

Most of the cases Buttrey cites address the military's court-martial jurisdiction. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955), for example, the government argued that a 1950 Act of Congress allowing the trial of ex-servicemen (for certain offenses committed while in the service) by courts-martial was a valid exercise of the power of Congress to make rules for the government and regulation of the land and naval forces, as supplemented by the necessary and proper clause. The Supreme Court, however, held that the power granted Congress to make rules to regulate the land and naval forces restricts court-martial jurisdiction to persons who are actually members or part of the armed forces. *Id.* at 15, 76 S.Ct. at 4. The Court stated:

> There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.

Id. In *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), the Supreme Court similarly held that the wives of servicemen overseas could not be tried by military authorities. The Court held that the power granted in article, I, §8, cl. 14 of the Constitution does not extend to civilians. Here, again, the Court stressed the encroachment on other provisions of the Constitution:

> Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.

Id. at 21, 77 S.Ct. at 1233. The two considerations referred to above—the constitutional source of the delegation and its infringement on constitutional protections—distinguish these cases from the one before us.

Another case Buttrey heavily relies upon, *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), is also distinguishable. There, the respondents had sought declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged surveillance of lawful and peaceful civilian political activity. The Supreme Court held that there was no justiciable controversy where the first amendment chilling effect was allegedly caused not by any specific action of the Army against respondents, but only by the existence and operation of the intelligence gathering and distributing system, which

was confined to the Army and related civilian investigative agencies. While recognizing that *Laird* was dismissed for lack of a justiciable controversy, Buttrey argues that language in the majority opinion, and in Justice Douglas' dissent, is particularly important. While the majority did refer to the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," *id.* at 15, 92 S.Ct. at 2326, nothing in the opinion suggests that the type of extension of authority involved in this case would come within that tradition. Justice Douglas spoke of the extension of the military's war powers to military surveillance over civilians, *id.* at 17, 92 S.Ct. at 2327, and the purpose and effect of the system of surveillance to deter the exercise of rights of political expression, protest, and dissent, *id.* at 25, 92 S.Ct at 2331. Again these factors distinguish the case before us. Buttrey has pointed to no constitutional protections infringed upon by the administration of the program by the Corps. The Corps' activities do not encroach upon the jurisdiction of Article III courts, and Buttrey does not allege that they chill first amendment rights or any other constitutionally protected interests.

We refuse to ignore the unique nature of the Corps, described by the district court as the civil arm of a military agency, and the expertise of the Corps developed in its performance of civil functions relating to the preservation and development of the nation's water resources for over 150 years. The Corps is limited in its authority to that which Congress provides and remains subject to revocation of that authority at any time at the will of Congress. Judicial review is available in the civil courts under the same standard of review that would apply to any other agency administering such a program. Civilian control is also effected by 10 U.S.C. §3013, which requires that the Assistant Secretary of the Army for Civil Works, whose principal duty is super-

vision of Army functions relating to water resources conservation and development, "be appointed from civilian life by the President, by and with the advice and consent of the Senate."

Our holding is of course limited to the particular facts of this case—the delegation of the dredge and fill permit authority of section 404 of the Clean Water Act to the Army Corps of Engineers. In stressing that fact, we repeat the words of the Supreme Court found at the close of the majority opinion in *Laird v. Tatum, supra,* at 15-16, 92 S.Ct. at 2326-27:

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

AFFIRMED.

APPENDICE C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN BUTTREY, ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL

CIVIL ACTION
NO. 80-1617

SECTION: "K"

OPINION

This matter came before the Court on cross-motions for summary judgment. The Court, after hearing oral argument, requested that the parties submit supplemental memoranda on the issue of whether an adjudicatory hearing is required when, as here, the jurisdiction of the Corps of Engineers ("the Corps") is challenged.

Having considered all arguments of counsel and having reviewed the voluminous administrative record and memoranda filed in this matter, this Court holds that:

1) where the Corps' regulatory jurisdiction over a proposed "dredge and fill" project is challenged, an adjudicatory hearing is not required for the purpose of determining the propriety of the jurisdictional claim;

2) the Corps has jurisdiction to require permit issuance for the project in question;

3) the procedures employed by the Corps in the processing of plaintiffs' permit were not unconstitutional;

4) on the basis of the administrative record, the permit was properly denied; and

5) plaintiff's claim for damages, allegedly due to either an unconstitutional taking of property without compensation or, alternatively, for the delay plaintiff has incurred as a result of the Corps' permitting process, is denied.

FACTS

In November, 1978, plaintiff John Buttrey applied to the Mobile, Alabama, district office of the U. S. Army Corps of Engineers for a permit to channelize a portion of an area known as Gum Bayou. This bayou, located in the vicinity of Slidell, Louisiana, is a tributary of the West Pearl River. The purpose of the proposed project was to improve drainage for the Magnolia Forest subdivision, an area developed by John Buttrey Developments, Inc. This corporate entity is also a named plaintiff. The channelized area was to measure 2,600 feet in length, 7 to 10 feet in depth, and would vary in width from 100 to 300 feet.

Buttrey's permit application was denied on April 2, 1980. This denial came after the project had been subject to the required public notice, a public comment period, and on-site inspections by Corps officials and representatives of other state and federal agencies. Buttrey had requested and received both an extension of time from the Corps within which to file a comprehensive memorandum of fact and law (including supporting expert reports), as well as a conference with the Corps District Engineer, Colonel Ryan. Buttrey has now appealed the permit denial to this

Court, asking declaratory and injunctive relief, as well as damages.

THE STANDARD OF REVIEW

The Court has utilized the "arbitrary and capricious" standard in its review of the permit denial which is the subject of this action. In applying this standard, the Court follows the substantial body of case law mandating its use. *See, e. g., Citizens to Preserve Overton Park Inc. v. Volpe,* 401 U.S. 402, 414 (1971); *DiVosta Rentals Inc. v. Lee,* 488 F.2d 674, 679 (5th Cir. 1973). The "substantial evidence" standard of review urged by plaintiff arises in conjunction with a rule-making provision of the Administrative Procedure Act, or when administrative action arises from a statutorily-mandated, on-the-record public adjudicatory hearing. 5 U.S.C. §551, *et seq.* Neither of these two settings pertain to a permit evaluation conducted pursuant to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1331 *et seq. See, e. g., Taylor v. District Engineer, U. S. Army Corps, etc.,* 567 F.2d 1332, 1335 (5th Cir. 1978).

The plaintiffs also contend that this Court's review of the Corps' proceedings should not be limited to the administrative record compiled by the Corps. While this Court allowed plaintiffs to take discovery depositions and has also reviewed those depositions in conjunction with the pending motions, there is strong support for the defendants' claim that any *de novo* judicial review is inappropriate. *See, e. g., Volpe, supra* at 415; *Camp v. Pitts,* 411 U.S. 138, 142 (1973); *F.P.C. v. Transcontinental Gas Pipeline, Inc.,* 423 U.S. 326, 331 (1976); and *DiVosta, supra* at 679. As stated in *Joseph G. Moretti, Inc. v. Hoffman,* 526 F.2d 1311 (5th Cir. 1976):

> We are equally unimpressed with Moretti,

Inc.'s argument that his discovery was curtailed. In *Gables by the Sea, Inc. v. Lee*, S.D. Fla. 1973, 365 F.Supp. 826, aff'd per curiam, 5 Cir. 1974, 498 F.2d 1340, the plaintiff sought to conduct extensive discovery proceedings to show that the Corps improperly denied his application for a dredge and fill permit. The discovery was denied on the basis that the action was a challenge, pursuant to the Administrative Procedure Act, to a final agency decision which must be reviewed only on the administrative record. "Information extraneous to the record should not be considered in the review procedure. If the agency action is found to be improper, the matter should be remanded to the agency; it would be improper to conduct *de novo* proceedings in the form of a trial by the district court to consider extra-record information." 365 F. Supp. at 830.

Nor need we tarry long to consider Moretti, Inc.'s lack of substantial evidence contention. "The appropriate standard for review was . . . whether the . . . adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2)(A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 1973, 411 U.S. 138 at 142, 93 S.Ct. 1241 at 1244, 36 L.Ed.2d 106. *Moretti, supra* at 1312.

In accordance with the above reasoning, this Court has confined its review of this matter to the administrative record.

JURISDICTION

In addressing plaintiffs' attack on the Corps' jurisdiction, it is necessary to examine the meaning of the term "navigable waters" as it appears in 33 U.S.C. §1344(a). It is this statute which creates the Corps' jurisdiction over the regulation of dredge and fill operations. The case law and legislative history indicate that this language is to be given broad interpretation. As stated in the Senate Conference Report to the FWPCA 1972 Amendments:

> The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes. Conference Report, S. Rep. No. 236, 92d Cong. 2d Sess. 114, reprinted in 1972 U.S. Code Cong. and Admin. News, p. 3822.

The Corps regulation which broadly defines "navigable waters" to include wetland areas (33 C.F.R. §323.2(a)(5)) has come under considerable judicial scrutiny. Yet the consistent result of such scrutiny has been its vindication. *See, e. g., Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 755 (9th Cir. 1978); *U. S. v. Byrd,* 609 F.2d 1204 (7th Cir. 1979); *U.S. v. Holland,* 373 F. Supp. 665, 674-676 (M. D. Fla. 1974).

DUE PROCESS AND THE NEED FOR AN ADJUDICATORY HEARING

As alluded to above, this Court requested that the parties present supplemental briefs on the issue of whether an adversary hearing is constitutionally required prior to the Corps' assertion of jurisdiction over a proposed project.

The plaintiffs originally contended that they were entitled to such an adversary hearing, based on a due process argument which this Circuit has previously considered in *Taylor, supra.* As the Court stated in *Taylor*, referring to the appellants' contention that they had been deprived of their property without due process: "We do not agree with appellants and feel that the procedures set forth in the regulations of the Corps easily satisfy the requirements of due process . . . . This Court has previously condoned the procedural protections provided for in these regulations, and has implied that these regulations satisfy Fifth Amendment due process." *Taylor, supra* at 1338.

Section 404(a) of the FWPCA (33 U.S.C. § 1344(a)) reads as follows: "The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material. . . ." The parties look to the legislative history for evidence of the Congressional intent which motivated the reference to "public hearings".

Historically, under the Rivers & Harbors Act of 1899, the Corps was given jurisdiction over fill permit proceedings. The Rivers & Harbors Act provided for informal, nonadversarial public hearings. Defendants cite Conference Committee language supporting their view that the Congress intended for that system of permit issuance to continue

under the FWPCA.

Plaintiffs attempt to invoke §554 and 556 of the Administrative Procedure Act as authority for their position that a hearing with the right to cross-examine is required. Close scrutiny of those statutes reveals that they are simply not applicable. Section 556 speaks to the requirement of an adversarial hearing for a Section 553 or 554 proceeding. Plaintiffs concede that Section 553 is inapplicable. Section 554 speaks to adjudications. Plaintiffs then argue by extrapolation, based on several liquor-licensing and pollution permit (§402) cases, that the dredge and fill permit proceeding is an adjudication.

The Corps attacks this position by pointing out that the §402 pollution permit cases relate to E.P.A. proceedings. The E.P.A. is a new agency, and as a result, Congress was able to write upon a "clean slate".

In addition, the facts of this case negate any inference that a due process denial occurred. The plaintiffs requested and were furnished those comments, positive and negative, which the Corps considered in evaluating the permit application. Plaintiffs also received, upon request, an opportunity to discuss with Colonel Ryan, the Corps District Engineer, the status of their application. Plaintiffs were also given a substantial extension of time within which to file a comprehensive legal memorandum responsive to the comments and reports alluded to above.

While this Court has serious reservations as to the propriety of the Corps, in cases such as this, in effect, determining its own jurisdiction while at the same time sitting as a finder of fact with judicial review confined to the "arbitrary and capricious" standard, this Court feels itself bound by the

existing jurisprudence which sanctions the same.

WETLAND STATUS

There is ample evidence in the administrative record indicating the wetland nature of the area in question. It is not an excepted "headwater" area, as plaintiffs would have this Court decide. This conclusion is based on a review of the objective "rate of flow" tests conducted by the Corps and plaintiffs' own expert. This Court is also convinced that, as provided in 33 C.F.R. §323.2, n. 3, the Corps may, in its discretion, use either of the two "rate of flow" measuring procedures set forth in its regulations. The Corps may also require a permit of even a "headwater" area, should it find that compelling environmental concerns so require. 33 C.F. R. §323.2, n. 2. Lastly, plaintiffs virtually concede in their supplemental opposition memorandum that a finding of wetlands status could be established by the Corps, should the jurisdictional hearing which this Court suggested at oral argument occur.

Leaving this seeming concession aside, the Corps enumerates several convincing factors which prompted its finding of wetlands status. It cites plaintiffs' own expert report, which refers to "soil [that] remains saturated most of the time". A soil saturation factor is contained in the Corps regulations' definition of wetlands (33 C.F.R. §323.2(c)).

The other agency reports which the Corps considered (from the Fish & Wildlife Service, the Environmental Protection Agency, and the National Marine Fisheries Service) all describe the area as a wetland. Plaintiffs claim that reliance on such evidence, all of which is contained in the administrative report, would constitute "hearsay" and is therefore unreliable. This contention receives no credence

under the case law. *See, e. g., DiVosta, supra* at 680:

> An examination of the record reveals that the objections from other agencies were put in terms sufficiently explicit to give Di Vosta an opportunity to try to refute them. At every turn, Di Vosta was given sufficient opportunity to communicate with these agencies in an effort to change their recommendations. In no respect can Di Vosta be said to have been deprived of its right to due process of law. As to the apparent hearsay objection raised in Di Vosta's brief, we have been cited to no case which holds that in a proceeding such as this, the Secretary is to be held to the rigid formalities of the hearsay rule.

The Corps is within its procedural rights in relying on these agency assessments. The Corps' finding of wetlands status and its decision not to engage in a formal wetlands determination is not unreasonable.

EQUAL PROTECTION

The plaintiffs make various unsubstantiated claims that their right to equal protection was violated. Aside from several allusions by plaintiffs to a nearby NASA project which evidently received a Corps permit, this Court fails to find any evidence that plaintiffs were treated differently from others similarly situated. Despite the discovery depositions which plaintiffs undertook, no evidence of discriminatory treatment is apparent.

THE "PUBLIC INTERESTS"

Plaintiffs make much of the Corps' failure to meaningfully articulate those "public interests" which, by statute (33 C.F.R. §320.4(a)), they must consider in the permitting process. Admittedly, some of Colonel Ryan's and Mr. Conlon's deposition testimony is somewhat unconvincing. However, despite the emphasis which plaintiffs have placed upon that testimony, this Court is not convinced that the "public interest" was ignored or dishonored.

The strong language which appears in *Ethyl Corp. v. EPA* regarding agency decisions in areas of scientific expertise is significant:

> The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. *Market Street Railway v. Railroad Commission*, 324 U.S. 548, 559-561, 65 S.Ct. 770, 776-777, 89 L.Ed. 1171, 1180-1182 (1945). The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was

rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U. S. at 416, 91 S.Ct. at 823, 28 L.Ed.2d at 153; *Bowman Transportation, Inc. v. Arkansas-Best Freight System Inc., supra,* 419 U.S. at 285, 290, 95 S. Ct. at 441, 444, 42 L.Ed.2d at 455, 458. It is settled that we must affirm decisions with which we disagree so long as this test is met. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 290, 95 S.Ct. at 444, 42 L.Ed.2d at 458; *United States v. Allegheny-Ludlum Steel Corp.; supra,* 406 U.S. at 749, 92 S.Ct. at 1946, 32 L.Ed.2d at 460.

Judgment shall be entered accordingly. 1/

New Orleans, Louisiana, this 31st day of March, 1981.

/s/ George Arceneaux, Jr.
UNITED STATES DISTRICT
JUDGE

1/ Plaintiffs have not responded to defendants' contention that the claim presented in Count V of plaintiffs' complaint is beyond this Court's jurisdictional reach. However, in view of this Court's opinion, it is unnecessary to reach full consideration of this issue.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN BUTTREY, et al

VERSUS

UNITED STATES OF AMERICA, et al

CIVIL ACTION
NO. 80-1617

SECTION "K"

JUDGMENT

This matter was taken under submission after the parties had filed their respective motions for summary judgment.

Now, therefore, for the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, United States of America, Clifford L. Alexander, Jr., Major General John W. Morris, and Colonel Robert H. Ryan, and against plaintiffs, John Buttrey and John Buttrey Developments, Inc., dismissing said plaintiffs' suit, each party to bear own costs.

New Orleans, Louisiana, this 6 day of April, 1981.

/s/ George Arceneaux, Jr.
United States District Judge

APPENDICE D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN BUTTREY and JOHN BUTTREY
DEVELOPMENTS, INC.

VERSUS

UNITED STATES OF AMERICA;
CLIFFORD L. ALEXANDERS, JR.,
SECRETARY OF THE ARMY OPERATING
THROUGH THE U.S. ARMY CORPS OF
ENGINEERS: LIEUTENANT GENERAL
JOSEPH K. BRATTON, CHIEF OF
ENGINEERS; and COLONEL ROBERT
H. RYAN, DISTRICT ENGINEER,
U.S. ARMY CORPS OF ENGINEERS
MOBILE DISTRICT

CIVIL ACTION
NO. 81-263

SECTION "K"

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,
and
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
ON COUNT1, AND MOTION TO DISMISS
COUNTS 2, 3, 4, and 5
HEARD ON SEPTEMBER 30, 1981

BEFORE: THE HONORABLE GEORGE ARCENEAUX,
JR. UNITED STATES DISTRICT JUDGE
NEW ORLEANS, LOUISIANA.

APPEARANCES:

For the plaintiff:

MESSRS. DEUTSCH, KERRIGAN & STILES
Attorneys at Law
4700 One Shell Square
New Orleans, Louisiana 70139
(BY: CHARLES K. REASONOVER
and
HOWARD J. ETTINGER

For the defendants:

NANCY S. BRYSON
Pollution Control Section
Land & Natural Resources Division
Department of Justice
Washington, D. C. 20530

PROCEEDINGS

THE COURT: Good morning.

MR. REASONOVER: Good morning, your Honor. We both have cross motions.

THE COURT: You started this, I think, Mr. Reasonover. You can be first at bat.

MR. REASONOVER: May if please the Court, Charles Reasonover, representing plaintiffs, Buttrey.

Your Honor, we have a five-count claim, and we filed motions for summary judgment on four of the counts. I believe the Government filed on five counts, so we actually have the entire complaint before the Court today.

THE COURT: I'm particularly interested in your argument relative to two claims: First of all, the claim that it's an unconstitutional delegation of power to designate the Corps of Engineers a military agency as the administrative agency in charge of civilian functions; and, secondly, whether or not you are entitled to test the Corps' claim of jurisdiction without first proceeding through the Administrative Procedures Act. I think you have a hint, by virtue of previous proceedings, what my views may be in connection with that. But I'm particularly anxious to deal with those two things, and then, during the course of argument, I want the Government to bear in mind the plaintiff's claim that the sewer plant may have been built in October of 1976, but the fill on which the sewer plant was built was actually completed, in place, and in effect made land long before this time.

Proceed, sir.

MR. REASONOVER: I will direct my initial argument to the two points to which the Court has most interest. Let me eliminate what we are not challenging, and this is basically what the Government's briefs cover. We aren't challenging the constitutionality under the commerce clause.

THE COURT: You're just challenging the right of the Government to vest this essentially civilian function in a military agency, as I appreciate it.

MR. REASONOVER: Yes, sir, and if this same function were vested in the EPA, we wouldn't be here with this argument today.

Let me trace, first, the history of what happened to reach the point under the Federal Water Control Act that placed this jurisdiction in the Corps. I guess the Rivers & Harbors Act of 1890 placed jurisdiction in the Corps over navigable waters, so everybody knows if you want to build a dam across the river you have to go to the Corps. The Supreme Court has passed on this many times; and we do not question the jurisdiction of the Corps to Section 10 of the Rivers & Harbors Act. What happened in the debates in Congress, somewhere along the way Senator Muskie said let the Corps of Engineers handle wetlands because they handle navigation, and one is under 403 and the other is under 404, so the jurisdiction is the same. And what has happened is that the Corps' jurisdiction has gone from the Mississippi River into Mr. Buttrey's back yard. The Corps is making unauthorized inspections, going on property - -

THE COURT: The Government says they didn't do this.

MR. REASONOVER: Well, sir, we filed a list of inspections that they made that we did not have notice of.

THE COURT: Well, weren't these facilities visually viewable from the roadways and streets and so forth?

MR. REASONOVER: Judge, I don't know, but I've told the Corps, and it's in writing, that anytime they want to go out there, call me or Mr. Buttrey, and we'll go with them.

THE COURT: I think that's fine. Answer my question. Couldn't these facilities be seen from the streets and the subdivision?

MR. REASONOVER: If it could be seen from the streets, we would not have a case.

THE COURT: I guess that answers my question, Mr. Reasonover.

MR. REASONOVER: Yes, sir. Yes, sir. I recognize there is an open fields exception to the legal search and seizure, and that would fall under that. To the extent they go on our property, or any other private property, as General Heiberg has directed in his instructions, you obtain the consent of the property owner. But, your Honor, that brings us to the point of what the Corps' activities, how distant they are from military functions. They're looking - - in some cases we're talking about a ditch that is two feet deep, two feet wide across the back of somebody's lot. This was not visual from the street. They issued a cease and desist order on that. But what happened, as far as the Corps is concerned, is the power now of the Clean Water Act, the Federal Water Pollution Control Act involving wetlands, and, your

Honor, related to another issue, the Corps, under a graduated basis, has extended its jurisdiction in four stages from navigable waters to traditional wetlands. And if I could start - - and I won't trace the history of the constitutional convention. We did cite that in our brief. I might add that the best language on this is the *Tatum* case, which involved the protest in 1972. It went up through the courts. The district court, D. C., found a violation of the Supreme Court rule that there was no justiciable controversy. In that case military intelligence was engaging in surveillance of civilians, maintaining files on them. Justice Burger, in a majority opinion, said we aren't condoning this, we aren't passing, we just find there is no justiciable controversy. The dissent discussed it at length. There is just absolutely no basis for the military to engage in jurisdiction over civilians with respect to entirely civilian matters. This has been consistently applied in every case that they have found. If you don't - -

THE COURT: But you have none involving the Corps of Engineers. You have indicated cases involving civil disturbances and matters of this kind, but nothing involving civil functions performed by, say, an agency such as the Corps of Engineers.

MR. REASONOVER: That's right, your Honor.

THE COURT: Are you saying that a military agency can never perform a civil as opposed to a military function?

MR. REASONOVER: Your Honor, if it cannot fall under the constitutional war powers, that's correct. Everything that we've traced, every case that's ever come up, it had to fall under some war power. Government cites only two cases that involve this question. One is the war Renegotiation Act,

what the Government pays for supplies, army supplies. We don't question that decision. It's a good decision. What the Government pays for military goods falls within the war powers. Another case was certain type of activity off of an army base, houses one mile from the base. The Government said they could bar it. The court said that's right, it involved the health of the soldiers. That's about as far as the courts have ever gone in extending military power to civilians.

THE COURT: Let me ask you this. The power of the Congress to provide flood control flows from the commerce clause of the Constitution. The Corps of Engineers historically has been charged with civil functions in connection with revetment work on the Mississippi River, construction of levees, dredging of the river to enhance capacities to move flood waters. Do you feel that this would be unconstitutional also?

MR. REASONOVER: On the Mississippi River, no, sir.

THE COURT: What is the difference? If it's a civilian function, isn't it a civilian function?

MR. REASONOVER: No, your Honor. I believe that when you get into the transportation, ability to transport military equipment, depth for vessels, the war effort - -

THE COURT: Can we agree, though, that the Congress exercises flood control and navigation functions by virtue of the commerce clause? You'll concede that that's not under the war powers clause, the national defense clause. The authorizations and appropriations made by the Congress for flood control, navigation, power generation, and so forth are pursuant to the commerce clause; are they not?

MR. REASONOVER: Judge, I don't know. I would say the Supreme Court cases that involved - - at that point it was called the Secretary of War - - always talked about navigation. And some of these Supreme Court cases said if you go outside of the reasonable bounds of what's necessary for navigation, the Secretary of War does not have jurisdiction.

THE COURT: How about flood control?

MR. REASONOVER: Flood control relates to the course of navigable waterways, and the courts have passed on that.

THE COURT: The Corps for years has built backwater levees around Mississippi River communities. Ferriday is a good example. Would the construction of that backwater levee to provide flood control also be a strictly military function, do you think?

MR. REASONOVER: Judge, your hypothet on the Corps' jurisdiction on backwater levees - - of course, we have levee districts in Louisiana that build these levees, and except for, maybe, emergency situations, I don't know of the Corps asserting jurisdiction in these areas. I may be wrong.

Judge, I cited the cases where the question has been presented, numerous courts, jurisdiction - -

THE COURT: None involving the civil function of the Corps of Engineers. Now, let's get to what I think is a very critical point of this, also, and that is whether or not you have to pursue your administrative remedies and exhaust them before you can contest the Corps' claim of jurisdiction. That, as I perceive it, is the basis of one of your claims; is it not?

MR. REASONOVER: Our claim is we filed a motion for declaratory judgment, in addition to injunctory relief, saying, for example, the sewage treatment plant that we built in 1976 - - a cease and desist order has been issued. It's an immediate problem. Your Honor, I could list the cases, such as the Avoyelles Parish case, which I know this Court is familiar with, and Eden Isles, that I participated in, that started out on the cease and desist, and went right on through trial.

There is only one case that the Government cites that comes close, *U.S. v. Byrd*, and where the Seventh Circuit said go back and apply for a permit. In that case the question was where were wetlands, what were the wetlands, and the court said: I'm not going to sit here and determine wetlands. That's for the administrative procedure.

In that case we have straight legal issues that are for the Court to determine, cases are uniform on that point. The jurisdiction of the Corps is for the Court and not for the Corps. We have five counts before the Court. The reference to the administrative agencies is a matter of discretion, and what we submitted to the Court was, if we have these other points, legal issues, no factual questions before the Court for determination, we'll concede for purposes of this argument that in the two situations where the cease and desist orders have been issued, the Court can assume that this area was a wetland. In one situation we say we don't need a 404 because we aren't filling in a wetland, and the other situation is saying - -

THE COURT: Both of which the Corps had the jurisdiction to issue those cease and desist orders.

MR. REASONOVER: As a matter of law.

THE COURT: Secondly, insofar as the Corps' claim that a levee was improperly constructed - - was it across Gum Bayou? Was that an instance of the digging of the pond?

MR. REASONOVER: No, sir. In digging the pond there was a roadway - -

THE COURT: There is some correspondence in the record that indicates that Mr. Buttrey wanted to put a culvert underneath the roadway, and the Corps said there is nothing really wrong with that. And apparently the Corps comes back and says, in addition to putting a culvert, he put a culvert with a flat drain in it, and then on top of that he put some levees, which indicates it's actually a drainage project as opposed to a road going someplace.

MR. REASONOVER: Your Honor, that matter is not before the Court by way of background.

THE COURT: I think the Government has brought it up.

MR. REASONOVER: Well, that letter is in the record, and they put it there, and maybe Ms. Bryson can answer why it's there. But the spoil from the wetlands was placed on this levee with respect to - - now, this levee is a roadway which raised the road, because of the flooding, three feet, that it was placed in that area, and that matter is the subject of a permanent application, and will, hopefully, be resolved outside of the court. And where that spoil came from doesn't have anything to do with this case. It is adjacent to the

area where the spoil was taken.

THE COURT: Okay. What about the Corps' correspondence and files? Have you received that?

MR. REASONOVER: Yes, sir, we did after the suit was filed.

THE COURT: Okay. So, really, that Count 5 is not before us at this point. That's been satisfied, that's mooted.

MR. REASONOVER: Judge, that particular case is mooted, yes, sir.

THE COURT: Thank you, Mr. Reasonover.

Okay, Government.

MS. BRYSON: May it please the Court, my name is Nancy Bryson. I'm with the Department of Justice, and I'm representing the Corps of Engineers this morning.

Let me go first to the question you asked me to address my argument to, and that's this issue about whether the sewage treatment plant was built by October 26, and whether the fill was placed in the area before that date. The reason these dates are important is that there is a phase-in provision in the Corps' regulations. The important one from the Corps' perspective with respect to the sewage treatment plant is found at 33 CFR 323.3(a)(2), and that says you need a permit for the discharge into the navigable waters of the United States and the adjacent wetlands after July 25, 1975.

THE COURT: The plaintiff is alleging that that was extended by Executive Order for sixty days, as I appreciate it. Was it - - to September 1?

MR. BRYSON: It may have been September 1. I can find out that definitely. I'm just not sure about that. I don't think that's really relevant to this case, because what Mr. Reasonover has said in his correspondence to the Corps, which is attached as an exhibit to our complaint, is that the fill was placed sometime between early in 1976 and September 1 of 1976. Their argument essentially is that the Corps is wrong in its decision that the wetlands involved are part of the wetlands of the West Pearl River. In other words, they are arguing the Corps has improperly decided these are adjacent wetlands to the West Pearl River. Their argument is that they are wetlands that can only be viewed as adjacent to a tributary of the West Pearl River, that is, Gum Bayou, and that the Corps had no jurisdiction over fill until after 1976. So the jurisdictional question they have asked the Court to resolve is whether the Corps has decided correctly that this piece of property is adjacent wetland or whether it isn't. What Mr. Reasonover is saying to you is that he recognizes the Corps should have jurisdiction, as this Court did in Buttrey - 1, to decide what is and what isn't a wetland, because that's a technical issue. The Corps' point of view in this matter is that the decision of whether something is an adjacent wetland or not is also a technical issue as to which the Corps has a certain expertise that it ought to be permitted to exercise. And that's why the argument the Government is presenting to you is that plaintiff should be required to exhaust their administrative remedies, to apply for an after-the-fact permit, which the Corps suggested that they do in connection with the sewage treatment plant.

THE COURT: Let's take an extreme case. Let's say that the Corps of Engineers, discovering that Mr. Cannizaro proposes to build this thirty-three story office building over here at the corner of Magazine and Poydras, issues a notice to Mr. Cannizaro, and says: Mr. Cannizaro, cease and desist from doing anything. We believe that this is wetland. It's adjacent to the Mississippi River.

Can Mr. Cannizaro come into court and determine the Corps' authority in issuing that cease and desist order, or must it go through an administrative process before it can come to the courthouse?

MS. BUTTREY: I think the state of the law is that he must go through an administrative process.

THE COURT: Is the administrative process at that point limited to the Corps making a record, or does it go through the entire gamut of bringing in Fish & Wildlife, and EPA, and the various other affected agencies, and then go into the merits of whether or not a permit should or should not be issued, or strictly limit itself to the jurisdictional issue? In other words, does he have to exhaust the entire gamut of administrative procedures relative to permit before the Government feels that the issue of the Corps' jurisdiction in requiring this procedure is ripe for review?

MS. BRYSON: I think the case law would support. I also think, as a matter of primary jurisdiction, that the Corps should be given an opportunity to make findings with respect to its own jurisdiction. I believe that's the course that was followed in the *Sportman League* case that Mr. Reasonover referred to. The case was sent to the Corps for them to make a determination as to whether the property in question was in fact a wetland, and that procedure might be appropriate here, although, again, it seems that - -

THE COURT: We're talking about the term "adjacent."

MS. BRYSON: Right.

THE COURT: As to whether or not this particular wetland area is, quote, adjacent, close quote, to the Pearl River, or adjacent to Gum Creek, which is a tributary of the Pearl River.

MS. BRYSON: That is correct. And the regulations have a definition of what the term "adjacent" is. That's found in Section 323.2(d). It says "The term, adjacent, means bordering, contiguous, or neighboring, wetlands separated from other waters of the United States by man-made dikes or barriers. Natural river berms, beach dunes, and the like, are adjacent wetlands."

If I could make an offer of proof on behalf of the Corps, I would just say the Corps' theory as to why this is an adjacent wetland is it's part of an area which is flooded by the West Pearl River during the periodic floods that that river makes, and for that reason, in the Corps' view, the vegetation that's present on that property owes its existence in a way to the periodic flooding of this particular land by the West Pearl River, and that is the reason for its decision that it is an adjacent wetland.

Does that answer the Court's questions as to the Government's position?

THE COURT: Yes, ma'am, it does.

MS. BRYSON: In respect to the argument on unconstitutional delegation of legislative authority, I think Mr. Reasonover started out his argument by saying he recognizes

that it was an appropriate delegation of authority from Congress to the Corps and the Secretary of War to handle the Section 10 permit process. And I think, having made that admission, the issues terminated at that point. The Supreme Court has issued many decisions upholding that delegation of authority to the Corps of Engineers under Section 10. The only thing that is different under the Clean Water Act is that the definition of navigable water has been extended quite a bit to include wetland like the property that we're talking about here. But on that issue practically every court that has considered the issue has said yes, Congress appropriately extended the definition of navigable waters, and under the Clean Water Act we're going to consider all parts of the hydrological cycle, which includes wetlands, as part of the navigable waters which the Corps of Engineers has authority to issue permits for. I would also point out that there is, of course, judicial review of the Corps of Engineers' decision with respect to permits.

Mr. Reasonover also mentioned that the Corps has made a number of unannounced inspections on his property. There isn't any argument in any of their papers on that issue. The only thing there is a letter from one of the Corps' lawyers, Joe Gonzales, to Mr. Reasonover that is attached as Exhibit 3 to their motion for summary judgment. I think if you look at that, your Honor, it becomes very plain that the inspections they are objecting to occurred as a result of sight visits on public roads that were undertaken by Corps personnel. They saw things from the road, including the sewage treatment plant, which was first observed because the leaves were off the trees when they were out there one day, as to which there isn't any problem and as to which, as pointed out in our papers, it appears the complaint was not right. Thank you.

THE COURT: All right, counsel. First of all, on the challenge to the Corps of Engineers' power to control civilian activity, the motion of the plaintiffs for summary judgment on that is denied, and the Government's motion for summary judgment as to that particular claim is granted. Let me say that perhaps one of the first functions that the United States Government undertook in even its very infancy was the improvement of navigable waterways, followed by the expansion of flood control. This has, historically a civil function, been assigned to the United States Corps of Engineers by the Congress. Indeed there exists within the United States Army Corps of Engineers a civil functions division. And if the Court's memory is correct, the appropriations provided by the Congress to the Corps of Engineers for these functions are characterized as appropriations, Army Corps of Engineer civil functions.

The Court believes that the exercise of the power of the Congress to control floods and provide flood control works emanates from the commerce clause of the Constitution, the very same clause which finds, and upon which is founded, the Government's authority in this instance, to attempt to regulate and deal with navigable waters and adjacent wetlands.

Therefore, the Court can perceive no difference insofar as the source of the power is concerned between such things as flood works, which have historically been performed by the Corps of Engineers under the commerce clause, and these functions which have been assigned by the Congress to the Corps of Engineers pursuant to power granted it under the commerce clause. Therefore, the Court finds no impropriety in this particular aspect of the civil arm of a military agency, the Corps of Engineers engaging in a civil function.

And whether that civil function would be the exercise of flood control functions under the commerce clause, whether it's in the exercise of Section 10 permitting power under the River & Harbor Act, or Section 403 and 404 authority, or either or both under the Federal Water Pollution Control Act and Clean Water Act, the Court sees no essential difference.

This is not the kind of thing which would offend the historically dominant and constitutionally required separation of military and civil power, and the supremacy of the civil power over the military power; and, accordingly, the motion for summary judgment by the plaintiff is denied. The motion for summary judgment on this count by the defendant is granted.

Insofar as the correspondence and so forth are concerned, the Court finds this claim to have become moot by virtue of the Corps of Engineers furnishing the requested information to the plaintiffs.

I am unable to render a summary judgment on the alleged illegality of the searches. There is a factual dispute between the plaintiffs and the Government as to how the searches were conducted. The plaintiff insists they were conducted from private property without authority. The Corps claims their visual inspections were accomplished either by aircraft or by virtue of Corps representatives traversing public roadways and viewing certain works from the vantage point of public property. Therefore, the summary judgment on that count is denied.

On the jurisdictional aspects, which as I perceive it are the remaining two claims, this is a matter which in Buttrey - 1 the Court indicated it troubled it. And that is whether

or not the Corps of Engineers should be able to exert a jurisdictional claim, and then be the agency to sit in judgment on whether or not that jurisdictional claim was appropriate, subject only to review by the courts in the event of a finding of assertion of jurisdiction being arbitrary and capricious. Unfortunately, the arbitrary and capricious standard in reviewing the Corps' actions is one which is imposed upon this Court, and I am unable, as I indicated in Buttrey - 1, to do anything more than to apply the standard as developed by the lower courts, and affirmed by the higher courts of the Federal judicial system. I'm also obliged, I think, despite the question and answer exchange between the Court and the Government counsel, to reserve my jurisdiction insofar as the Corps' exertion of jurisdiction in this case is concerned pending a hearing by the Corps and an administrative proceeding by the Corps limited solely to the jurisdictional claim. As I appreciate what happened in Avoyelles Sportsman's League, the circumstances were not dissimilar. I think it would be manifestly unfair to compel a citizen to run the entire gamut of an administrative proceeding until it was established that the basis on which the Corps of Engineers exercised jurisdiction is proper, or claimed that jurisdiction is proper. I think the very ridiculousness of the situation which the Court propounded as a hypothetical to Government counsel demonstrates the trap into which an arbitrary exercise of Government power could place our citizens should there not be some limited requirement that the initial proceedings in connection with the Corps' exercised claim of jurisdiction be limited to that claim of jurisdiction, and not compel the expense and inconvenience to our citizens to go through a complete permit application prior to determining the propriety of the Corps' jurisdiction.

I'm compelled to observe, however, that I don't think the term "adjacent" is necessarily a term which is subject to any

particular expertise. I'm not sure that the Congress used it in that sense, but I'm going to await the result of the hearing. Consequently, the judgment will be entered in accordance with these reasons. I am going to retain jurisdiction of this cause, but I'm going to direct that, while jurisdiction is retained in this Court, that the administrative proceedings before the Corps of Engineers relative to the Corps jurisdiction in matters presented in this court be commenced, that they be pursued promptly, and that the Court will entertain at the proper time an application of review of the Corps' findings, utilizing the standards which the superior courts of the Federal system have decreed to be appropriate.

Now, one final thing in passing. Louisiana is blessed with an abundance of wetlands, constituting one of this state's most precious and productive natural resources. As I perceive this case, which is the second time Mr. Buttrey and the Corps of Engineers have engaged in legal fisticuffs in the last twelve months, it involves approximately twenty-five thousand square feet of filled area upon which is located a package sewer plant. I suggest that we should be very careful as to all parties that we don't involve ourselves in what could well become, and may be beginning to acquire the earmarks of, a vendetta by the Corps against Mr. Buttrey, or Mr. Buttrey against the Corps. I realize that all the wetlands are important, but we have just consumed an enormous amount of time, and are consuming an enormous amount of economic resources in the way of money, talent and expertise dealing with approximately a half acre of land - - made land at the very worst view - - upon which is located a package sewer plant designed to serve a subdivision. I realize that the law is the law, and must be obeyed by all people, but there comes a time, it seems to this Court, we may reach the

point of reductio ad absurdum. The Court takes judicial notice, based on its own experience, that there are fill and dredge operations conducted daily in the wetlands of this state, involving much larger areas, which are not being conducted pursuant to Corps of Engineer permits, and apparently as to which there is no real effort being made to stop them. I think it's about time we started keeping our eyes on the doughnut and get away from looking at the hole. Thank you very much.

APPENDICE E

33 U.S.C. §1344.

Permits for dredged or fill material

(a) The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse

effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e)(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material–

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g)(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have in-

dependent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h)(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under Paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which–

(i)apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, received notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice

of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State–

(A) has the authority set forth in paragraph (1) of this subsection; the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary,

who upon subsequent notification from such State that it is administering such program, shall suspend the issurance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Whenever the Administrator determines after public hearing that a State is not administering a program approved under section (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State,

and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection

and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) In accordance with guidelines promulgated pursuant to subsection (i) (2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h) (2) (A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(*l*) The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secre-

tary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(*o*) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published

under subsection (a) of this section.

(r) The discharge of dredge or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s)(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable,

taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(4)(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(B) For the purposes of this paragraph, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(5) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(t) Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

No. 82-1303

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN BUTTREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
KAY L. RICHMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 404 of the Clean Water Act, 33 U.S.C. 1344, is unconstitutional insofar as it delegates to the United States Army Corps of Engineers regulatory authority over civilian activities.

2. Whether the procedures employed by the Corps in processing petitioners' permit application under Section 404 satisfied the requirements of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statutes and regulations:

Page

Constitution, statutes and regulations—Continued:

Page

Constitution, statutes and regulations—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1303

JOHN BUTTREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in C.A. No. 81-3234 (*Buttrey I*) (Pet. App. A-1 to A-33) is reported at 690 F.2d 1170. The opinion of the court of appeals in C.A. No. 81-3649 (*Buttrey II*) (Pet. App. A-34 to A-44) is reported at 690 F.2d 1186. The opinions of the district court in both cases (Pet. App. A-45 to A-55, A-57 to A-76) are not reported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on November 8, 1982. The petition for a writ of certiorari was filed on February 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases challenge both the procedures used by the United States Army Corps of Engineers (the Corps) when it processes permit applications under Section 404 of the Clean Water Act, 33 U.S.C. (Supp. V) 1344, and, more broadly, Congress' delegation of regulatory authority to the Corps under Section 404.

1. a. The procedural challenge in *Buttrey I* arises from petitioners' unsuccessful attempt to obtain from the Corps a permit, required by Section 404, to undertake a dredge and fill operation in a wetland area known as Gum Bayou, near Slidell, Louisiana (Pet. App. A-2, A-32). Following petitioners' submission of a permit application, the Corps, on February 2, 1979, issued a formal public notice of the proposed operation (*id.* at A-2). Comments opposing issuance of the permit were then received from numerous private organizations and individuals, as well as three federal agencies, the Fish and Wildlife Service, the Environmental Protection Agency, and the National Marine Fisheries Service (*ibid.*).[1]

As required by Corps regulations, 33 C.F.R. 325.2(a)(3), all of the comments were forwarded to petitioners, who requested and were granted a six-month extension of time for submitting their response (Pet. App. A-3). Eventually, petitioners submitted a comprehensive response that included rebuttal of adverse comments; separate written comments prepared by a consulting engineer, a biology professor at Tulane University and several private individuals; and a legal memorandum supporting issuance of the

---

[1]As noted by the court of appeals (Pet. App. A-2 to A-3), those commenting objected that the proposed project would "destroy natural drainage and sewage treatment capacity, replace a habitat and nursery ground for wildlife with residential homes, perhaps irrevocably damage an aesthetically pleasing wetland area, and, finally, increase the risk of flooding."

permit (*id.* at A-3, A-17). Petitioners also sought notification of any specific objections considered by the Corps to warrant denial of the permit and an opportunity to respond to those objections; a conference with Corps officials; and an adversary hearing, with an opportunity to cross-examine witnesses, if the Corps was of the view that any particular objection might preclude issuance of the permit (*id.* at A-3). The responsible Corps official, District Engineer Colonel Ryan, responded that Corps regulations preclude a full adversary hearing; however, an informal conference took place on February 8, 1980.

On April 2, 1980, the Corps denied petitioners' permit application. The decision was explained and supported in three separate documents: an "Environmental Assessment," an "Evaluation of the Effects of the Discharge of Dredged or Fill Material Into Waters of the U.S. Using the Section 404(b) Guidelines," and a document entitled "Findings of Fact" (Pet. App. A-4, A-17). Pursuant to Corps regulations, these documents were mailed to petitioners (*id.* at A-17 to A-18).

b. On May 2, 1980, petitioners filed suit against the United States, the Secretary of the Army, and two Corps officials in the United States District Court for the Eastern District of Louisiana, challenging, *inter alia*, the procedures used by the Corps in processing Section 404 permit applications (Pet. App. A-4 to A-5). On cross-motions for summary judgment, the district court entered summary judgment in favor of respondents and against petitioners (*id.* at A-45 to A-56). The court held, so far as here relevant, that the Corps is not required to afford permit applicants formal adjudicatory hearings and that the procedures employed by the Corps in processing petitioners' permit application were not unconstitutional (*id.* at A-45 to A-46, A-50 to A-51).

2. a. The constitutional challenge, in *Buttrey II*, to Congress' delegation of regulatory authority to the Corps arises in the context of the Corps' issuance of two cease and desist orders to petitioners. The first, dated May 5, 1980, advised petitioners that their placement of fill in a wetland area preparatory to construction of a sewage treatment plant was regulated by the Corps and that initiating such work without a permit violated Section 404 of the Clean Water Act, 33 U.S.C. 1344. The second order, dated November 21, 1980, advised petitioners that their construction of a levee and dredging of a wetland area adjacent to the Morgan River were similarly regulated by the Corps and that initiating such work without a permit violated Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act. (Pet. App. A-34 to A-35.)

b. In response to these cease and desist orders, petitioners filed suit in the United States District Court for the Eastern District of Louisiana on January 21, 1981. Count I of the complaint, the only count here relevant, alleged that the Corps' exercise, under Section 404, of regulatory jurisdiction over private property and private activities of United States citizens is in violation of the Constitution because the Corps is a part of the military. Following submission of cross-motions for summary judgment on this issue, the court, finding no constitutional infirmity in the Corps' administration of the Section 404 program, granted the Corps' motion and denied petitioners'. (Pet. App. A-34 to A-36, A-72 to A-73.)

3. The court of appeals affirmed the district court's judgments in both cases (Pet. App. A-1 to A-33; *id.* at A-34 to A-44). Specifically, the court of appeals held that the delegation of authority to the Corps in Section 404 of the Clean Water Act is constitutional (Pet. App. A-44); that

neither the Administrative Procedure Act nor the Due Process Clause of the Fifth Amendment entitles petitioners to a trial-type hearing on their permit application (Pet. App. A-27); and that petitioners were given all the procedural protections to which they are entitled under the Due Process Clause (*ibid.*).

ARGUMENT

The decisions of the court of appeals are correct, do not conflict with any decision of this Court or any other court of appeals, and do not warrant review by this Court.

1. Petitioners argue (Pet. 8-15) that Section 404 of the Clean Water Act unconstitutionally delegates regulatory authority over civilian activity to the Corps, a branch of the military.

Petitioners rely on Article I, Section 8, Clauses 11-14 of the Constitution (the "war powers") and on several cases limiting the authority that Congress can extend to the military under its war powers. However, congressional authority to regulate discharges of dredged or fill material into waters of the United States is founded, not on the war powers, but on the Commerce Clause, and the Section 404 program has consistently been upheld as a proper exercise of the commerce power.[2] Delegation of this regulatory authority to the Corps, moreover, is an appropriate means of exercising this power. Prior to passage of the 1972 Amendments to what is now called the Clean Water Act, there was some dispute as to whether the Environmental Protection Agency or the Corps should be selected as the agency to implement the Section 404 program. Ultimately, however, the Corps was chosen because it had the expertise

---

[2]See, *e.g.*, *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978); *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1319, 1323-1324, 1325 (6th Cir. 1974).

and the administrative machinery necessary to implement the program. As Senator Muskie explained in presenting the conference agreement to the Senate:

> The Conferees were uniquely aware of the process by which the dredge and fill permits [under Section 10 of the Rivers and Harbors Act of 1899] are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.

118 Cong. Rec. 33699 (1972). Thus, as the court of appeals concluded (Pet. App. A-40), the end of the legislation — "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)) — is clearly legitimate, and the means selected for achieving that end — granting regulatory authority to the Corps — are entirely appropriate under the Necessary and Proper Clause (U.S. Const., Art. I, § 8, Cl. 18). See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421, 423 (1819); *Atkins* v. *United States*, 556 F.2d 1028, 1061 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

Nor is administration of the Section 404 program by the Corps prohibited by any other constitutional provision. Petitioners argue (Pet. 13-14) that the war powers clauses constitute a clear prohibition on use of a branch of the military for civilian functions and, further, that if Congress can legislate with respect to the military to the full extent of its commerce power, then the war powers provisions have no application or meaning. But nothing in the war powers clauses even addresses use of the military for civilian functions. See U.S. Const., Art. I, § 8, Cls. 11-14.[3] *Moreover*,

---

[3]In the court-martial cases on which petitioners principally rely (Pet. 12-13), the military's statutory authority to try civilians by court-martial was found to conflict with the civilians' constitutional rights to trial by jury and indictment by grand jury. See, *e.g.*, *Reid* v. *Covert*, 354

the fundamental purpose of the Founders in setting forth Congress' war powers was to limit *executive* action with respect to the military.[4] This purpose is in no way compromised by the Corps' administration of Section 404, because *Congress* explicitly authorized the program and selected the Corps to administer it.[5]

Finally, as the court of appeals suggested (Pet. App. A-43 to A-44), the Corps' exercise of regulatory functions under Section 404 does not elevate military over civilian power in

---

U.S. 1, 7, 19, 22 (1957). In contrast, petitioners have failed to cite any constitutional provision that is infringed by the Corps' administration of the Section 404 program. Furthermore, unlike the court-martial cases, the Section 404 program, as we have already noted, is authorized under the Commerce Clause, not the war powers, and Corps administration of the program is an appropriate exercise of the commerce power.

Although the Court's opinion in *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), also cited by petitioners (Pet. 10-12), contains dicta referring to the "traditional and strong resistance of Americans to any military intrusion into civilian affairs," the court of appeals correctly noted (Pet. App. A-43) that "nothing in the opinion suggests that the type of extension of authority involved in this case would come within that tradition."

[4]See, *e.g.*, Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 184-185 (1962) ("The President was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies."); *Reid* v. *Covert*, *supra*, 354 U.S. at 68 (Harlan, J., concurring) (emphasis in original; footnote omitted) ("what [the Founders] feared was a military branch unchecked by the *legislature*, and susceptible of use by an arbitrary *executive* power"); *The Federalist No. 24* (A. Hamilton) (restraints upon the discretion of the legislature, in respect to military establishments, would be improper).

[5]In this context, petitioners' reliance (Pet. 9-10) on the legislative history of the Posse Comitatus Act is most curious. That Act prohibits use of the Army to execute the laws, "*except in cases and under circumstances expressly authorized by* the Constitution or *Act of Congress*." 18 U.S.C. 1385 (emphasis added). Thus, Congress explicitly reserved for itself the authority to direct the Army to execute the laws.

any proscribed fashion. The Corps exercises only that power which Congress directs it to exercise. Judicial review of the Corps' decisions is available in the civilian courts under the same standard of review that applies to other agency decisionmaking; no particular deference is given to "military judgment." And civilian control is also ensured by 10 U.S.C. (Supp. V) 3013, which requires that the Assistant Secretary for Civil Works, whose principal duty is supervision of Army functions relating to water resources conservation and development, "be appointed from civilian life by the President, by and with the advice and consent of the Senate." Clearly, the Corps' administration of the Section 404 program — like its historic responsibility for civilian functions relating to preservation and development of our Nation's water resources (see Pet. App. A-43) — is fully consistent with the Constitution.

2. Petitioners argue (Pet. 15-19) that, prior to denying their application for a permit under Section 404, the Corps was required, under the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. V) 551 *et seq.*, to hold a formal adjudicatory hearing, including opportunity for oral presentation of evidence and cross-examination.[6] Under the terms of the APA, however, the provisions governing formal agency hearings, 5 U.S.C. (& Supp. V) 556, apply only if the substantive statute authorizing the agency to act requires disputes to be "determined *on the record* after opportunity for an agency hearing." 5 U.S.C. (& Supp. V)

---

[6]Corps regulations provide permit applicants with a "paper hearing" — notice of objections to issuance of the permit and an opportunity to submit rebuttal to those objections. 33 C.F.R. 325.2(a)(3). The regulations also provide for "public hearings." 33 C.F.R. Part 327. But these are informal, information-gathering proceedings rather than trial-type adversary hearings. See 33 C.F.R. 327.3(a), 327.7, 327.8. Cross-examination of witnesses is not permitted. 33 C.F.R. 327.8(c).

554(a) (emphasis added).[7] In this case, the relevant statutory provision, Section 404(a) of the Clean Water Act, provides simply that the "Secretary [acting through the Chief of Engineers] may issue permits, after notice and opportunity for public hearings [8] for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Clearly the statute does not expressly require an adjudication "on the record."

While the absence of these words is not necessarily dispositive, there must be some evidence of congressional intent to require a trial-type hearing. *United States* v. *Florida E. C. Ry.*, 410 U.S. 224, 238 (1973); *United States Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519, 536 (D.C. Cir. 1978).[9] Petitioners, however, have cited no

---

[7] 5 U.S.C. 556(a) provides:

> This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

Section 553 deals with rulemaking and is, therefore, inapplicable. Section 554, entitled "Adjudications," provides, in pertinent part:

> This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *.

5 U.S.C. (& Supp. V) 554(a). As the latter section indicates, the requirement that the agency proceeding involve "adjudication" is a necessary, but not sufficient, condition for application of trial-type procedures under 5 U.S.C. (& Supp. V) 556.

[8] As noted by the court of appeals (Pet. App. A-10, quoting 2 K. Davis, *Administrative Law Treatise* § 12:7, at 434 (2d ed. 1979)), " 'when many are affected, [the term "public hearing"] usually means a speech-making hearing rather than a [trial-type] hearing with a determination on the record.' "

[9] Petitioners argue (17-18) that Section 404 requires trial-type hearings because three circuits have construed virtually identical language in Section 402(a)(1) of the Clean Water Act, 33 U.S.C. 1342(a)(1), as requiring that EPA, the permitting authority under Section 402, provide trial-type hearings to applicants for National Pollutant Discharge

such evidence. To the contrary, as the court of appeals observed (Pet. App. A-8), the relevant legislative history reflects that "Congress did not intend that the 'public hearings' called for in section 404 be trial-type hearings on the record." As discussed above (see pages 5-6, *supra*), the Corps, rather than EPA, was chosen as the authority to issue permits under Section 404 because Congress was "uniquely aware" of the process by which the Corps was already handling permits under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Congress did "not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." 118 Cong. Rec. 33699 (1970) (remarks of Senator Muskie). That pre-existing permit system operated pursuant to Corps regulations that provided for informal public hearings (33 C.F.R. 209.120(g) (1972)), but not for formal adjudicatory hearings. See, *e.g.*, *Taylor* v. *District Engineer*, 567 F.2d 1332, 1334-1336 (5th Cir. 1978). Thus, as the court of appeals pointed out (Pet. App. A-8), "[t]his is one of those rare instances when a statute's history leaves no room for doubt." Accordingly, the courts below correctly

---

Elimination System permits. As the court of appeals correctly noted (Pet. App.A-7 to A-8), however, none of the three opinions construing Section 402 held that the relevant statutory language — "after opportunity for public hearing" — was so clear that it was unnecessary to look beyond that language for indications of congressional intent to require a trial-type hearing. See *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872, 875-878 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1262-1264 (9th Cir. 1977); *United States Steel Corp.* v. *Train*, 556 F.2d 822, 833-834 (7th Cir. 1977). The presence of the term "public hearing" in both statutory provisions, accordingly, does not require that Section 404 be construed in the same way as Section 402. See also *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 218 (1980) ("opportunity for public hearing" requirement is "rather amorphous"); *Environmental Defense Fund, Inc.* v. *Costle*, 631 F.2d 922, 927 (D.C. Cir. 1980), cert. denied, 449 U.S. 1112 (1981) ("public hearing" may have different meanings, even in the same statute).

concluded that the APA does not require the Corps to conduct trial-type hearings in deciding whether to issue permits under Section 404. Accord: *Nofelco Realty Corp.* v. *United States*, 521 F. Supp. 458, 461 (S.D. N.Y. 1981).[10]

3. Finally, petitioners argue (Pet. 19-28) that they were entitled, under the Due Process Clause of the Fifth Amendment, to an adversary hearing on their permit application. The court of appeals correctly rejected this argument. In so doing, the court applied the three factors identified by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), as useful in determining what process is due in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

First, the court of appeals properly concluded (Pet. App. A-14) that petitioners' private interest is not, in itself, sufficient to demand imposition of full trial-type procedures. As the court observed (*ibid.*), petitioner Buttrey is not a person "on the very margin of subsistence" and denial of his permit application will not deprive him of "the very means by which to live." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at

---

[10]This conclusion is also confirmed by the subsequent legislative history of the Clean Water Act. As the court of appeals noted (Pet. App. A-9 to A-10), when Congress amended the statute in 1977, it was not concerned with increasing the amount of "process" accorded Section 404 permit applicants but, rather, with simplifying and expediting the permit process. See S. Rep. No. 95-370, 95th Cong., 1st Sess. 80 (1977); H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 104, 105 (1977).

340 (quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970)). Furthermore, the government in this instance was merely denying a request, not taking action against petitioners. This distinction is important, because "[r]evocation of a license is far more serious than denial of an application for one; in the former instance, capital has been expended, investor expectations have been aroused, and people have been employed." Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1296 (1975).[11] Thus, the degree of deprivation at stake here does not call for elaborate procedural protections.

Second, the court of appeals also correctly concluded (Pet. App. A-27) that the Corps' "paper hearing" procedures, together with an informal face-to-face conference, afforded petitioners a great deal of process and that requiring a trial-type hearing would probably not reduce the chance of error. As required by Corps regulations (33 C.F.R. 325.2(a)(3)), all comments opposing issuance of the permit were forwarded to petitioners, who then were given six months to prepare a comprehensive response, which included rebuttal of adverse comments, separate written comments prepared by a consulting engineer and a biologist, and a legal memorandum (Pet. App. A-3, A-17). Contrary to petitioners' suggestion (Pet. 24), the comments

---

[11]Cf. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332 (*continued* receipt of disability benefits is a protected property interest); *Morrissey* v. *Brewer*, 408 U.S. 471, 481-482 (1972) (distinction between revocation of parole and denial of parole).

The distinction here is similar to that which the APA makes between applications for initial licenses, and applications for renewal of licenses or agency modification of licenses; in the former situation, an agency may proceed without a hearing "on the record." See 5 U.S.C. 556(d). Contrary to petitioners' assertion (Pet. 21), 5 U.S.C. 551 is not to the contrary; it does not require a hearing whenever an agency permit is granted, denied or revoked, but simply defines the process of "adjudication" as including these agency actions. See 5 U.S.C. 551(6) and (7), (9).

opposing issuance of the permit all tended to raise the same few objections (see Pet. App. A-2 to A-3), so there was no mystery regarding the nature of the comments to which petitioners needed to respond.[12]

The issues raised in the permit process, furthermore, were amenable to effective written presentation. Although petitioners argue (Pet. 25-28) that the court of appeals erred in finding (Pet. App. A-12, A-24) that their dispute with the Corps concerns only legislative facts, even at this stage they have failed to raise any genuinely disputed "adjudicative" facts.[13] Even if the wetlands determination could be construed as a question of adjudicative fact, petitioners conceded below (see Pet. App. A-32) that the project area is a wetland. As for the determinations of whether the proposed project would have adverse environmental effects and whether the public interest would be served by authorizing the project, these clearly involve "legislative" facts. The determinations do not entail review of past actions, but

---

[12]It also must be presumed that petitioners were aware that, under Corps regulations, their permit application would not be granted unless they demonstrated: first, that "the benefits of the proposed alteration outweigh[ed] the damage[s]"; second, that "the proposed activity [was] primarily dependent on being located in, or in close proximity to the aquatic environment"; and, third, that the proposed project could not be located on any "feasible alternative sites." 33 C.F.R. 320.4(b)(4). As the court of appeals remarked (Pet. App. A-25, citing *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973)), petitioners did not even attempt to make these showings and even "trial-type safeguards could do nothing to remedy so fundamental a flaw in the prima facie case."

[13]Adjudicative facts usually answer the questions of who did what, where, when, how, why, and with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.

2 K. Davis, *supra*, § 12:3, at 413.

instead require predictive judgments that implicate questions of policy and discretion.[14] Thus, both determinations turn on the application of agency expertise and neither can be decisively resolved by the taking of testimony. Arguments usefully addressing these issues are therefore particularly appropriate for written presentation.[15] Oral presentation and cross-examination, on the other hand, are inappropriate because veracity and demeanor are not important where the determinations at issue turn on scientific judgment and expert opinion.[16] What is needed in such cases is a predecision opportunity, not to cross-examine, but to comment. Petitioners had this opportunity and took advantage of it. This is not a case where the permit applicant, his lawyers, his expert biologist and his expert engineer lacked ability to write effectively.[17] Thus, the second *Mathews* factor also does not entitle petitioners to an adversary hearing.

---

[14]As the court of appeals reasoned (Pet. App. A-19 to A-20, A-24), certain basic policy judgments in this case have already been made and these judgments foreclose much of petitioners' argument. For example, the Corps' regulations state: "Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 C.F.R. 320.4(b)(1).

[15]See Friendly, *supra*, 123 U. Pa. L. Rev. at 1280. See also Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 Harv. L. Rev. 612, 630-631 (1971).

[16]See, *e.g.*, *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343-344 & n.28; *Basciano* v. *Herkimer*, 605 F.2d 605, 610-611 (2d Cir. 1978), cert. denied, 442 U.S. 929 (1979); 2 K. Davis, *supra*, § 12:8, at 437-438, 440.

[17]See Pet. App. A-16 & n.4. Compare *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) (written submissions unrealistic for most welfare recipients, who lack the education to write effectively and cannot obtain professional assistance). In any event, the Corps also gave petitioners an oral hearing with the District Engineer, thereby affording them an extra measure of process (see Pet. App. A-26).

Third, the court of appeals also properly concluded (Pet. App. A-14 to A-15) that requiring adjudicatory hearings in Section 404 cases would impose a substantial and costly burden on the government. As the court noted (Pet. App. A-15), the Mobile District alone processes some 1,200 applications per year, yet the Corps has no administrative law judges assigned to it. Under these circumstances, it is clear that the public's interest in seeing that the Corps carry out its statutory mandate would be compromised if formal hearings were routinely required.[18]

Accordingly, petitioners are not entitled to an adjudicatory hearing under the Due Process Clause. As the court of appeals concluded (Pet. App. A-27), this additional process "would simply not be worth the cost."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
KAY L. RICHMAN
Attorneys

APRIL 1983

---

[18]See *Costle* v. *Pacific Legal Foundation*, *supra*, 445 U.S. at 215 (requiring EPA to hold hearings routinely would raise questions about its ability to administer its program); S. Rep. No. 95-370, *supra*, at 80 (expressing congressional concern that delay in processing of Section 404 applications be eliminated); H.R. Conf. Rep. No. 95-830, *supra*, at 104 (same).